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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

RUDOLF KERN AND
JOHN S. HABBLETT, LTC (Ret.) *et al.*,

Petitioners,

v.

SIEMENS CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a mass disaster case, a court may certify a (b)(3) "opt-in" class as to liability only under Fed.R.Civ.P. 23?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

LIST OF ALL PARTIES 1

OPINIONS BELOW 2

JURISDICTION 2

FEDERAL RULE INVOLVED 2

STATEMENT OF FACTS 3

REASONS FOR GRANTING THE PETITION 4

THIS COURT SHOULD RESOLVE WHETHER RULE 23(b)(3) CLASSES MAY BE CERTIFIED ON AN OPT-IN BASIS IN APPROPRIATE CIRCUMSTANCES 4

THE SECOND CIRCUIT DECISION IS CONTRARY TO THE TEXT OF RULE 23 AND WELL REASONED DECISIONS OF OTHER CIRCUIT AND DISTRICT COURTS 6

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES Page

Bersch v. Drexel Firestone, Inc.,
519 F.2d 974 (2nd Cir. 1975) 5

In re Coordinated Proceedings in Antibiotics Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971) 6

Enterprise Wallpaper Manufacturing Co. v. Bodman,
85 F.R.D. 325 (S.D.N.Y. 1980) 9

In re: Ski Train Fire in Kaprun, Austria,
220 F.R.D. 195 (S.D.N.Y. 2003) 2

Iowa v. Union Asphalt & Roadoils, Inc.,
281 F. Supp. 391 (S.D. Iowa 1968) 8

Kern v. Siemens Corporation,
393 F.3d 120 (2d Cir. 2004) 2

Kyriazi v. Western Electric Company,
647 F.2d 388 (3rd Cir. 1981) 7

Philadelphia Electric Co. v. Anaconda American Brass Co.,
43 F.R.D. 452 (E.D. Pa. 1968) 8

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 5

Robinson v. Union Carbide Corp.,
544 F.2d 1258 (5th Cir. 1977) 9

Snell v. Allianz Life Insurance Co. of North America,
327 F.3d 665 (8th Cir. 2003) 8

Spark v. MBNA Corp.,
157 F. Supp. 2d 330 (D. Del. 2001),
aff'd without opinion 9

FEDERAL STATUTES AND RULES Page

28 U.S.C. §1254(1) 2

28 U.S.C. §1332 2

29 U.S.C. §216(b) 6

Fed.R.Civ.P. 23 ..... passim

TREATISES AND LAW REVIEW ARTICLES

Alba Conte & Herbert B. Newberg, Newberg on Class Actions Vol. 3 §7:41 (4th ed. 2002) 6

Jack B. Weinstein and Eileen B. Hershenov, "The Effect of Equity on MassTort Law," 1991 U. Ill. L. Rev. 269, 275 (1991) 6

Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 Harv. L. Rev. 356, 397-398 (1967) 5

LIST OF ALL PARTIES

Petitioners: RUDOLF KERN, and on behalf of the Estate of Erich Kern, ANGELA KERN, and on behalf of the Estate of Erich Kern, JOHN S. HABBLETT, LTC. (RET.), and on behalf of the Estates of Jennifer Kirkpatrick Habblett Goodridge, Michael Jonclair Goodridge and Kyle William Goodridge, SUZANNE K. HABBLETT, and, on behalf of the Estates of Jennifer Kirkpatrick Habblett Goodridge, Michael Jonclair Goodridge and Kyle William Goodridge, DICK BAKER, DR., And, on behalf of the Estate of Carrie Lynn Baker, CAROL BAKER, and, on behalf of the Estate of Carrie Lynn Baker, CLAIRE GOODRIDGE, individually as surviving father and as personal representative of the estate of Maj. Michael Clair Goodridge, deceased and individually as surviving grandfather and as personal representative of the estates of Michael Jonclair Goodridge, deceased and Kyle William Goodridge, deceased for himself and on behalf of decedents' estates, the distributes thereof and on behalf of decedents' surviving next of kin, including Julianne V. Goodridge, the surviving mother of Maj. Michael Clair Goodridge and surviving grandmother of Michael Jonclair Goodridge and Kyle William Goodridge.

Respondents: SIEMENS CORPORATION, SIEMENS AG, WAAGNER-BIRO BINDER AG IN ABWICKLUNG, WAAGNER-BIRO BINDER BETEILIGUNGS AG, WB HOLDING AG, BINDER + CO AG, BOSCH REXROTH AG, BOSCH REXROTH CORPORATION, AND OMNIGLOW CORPORATION.

OPINIONS BELOW

The District Court's decision in *In re: Ski Train Fire in Kaprun, Austria*, certifying an opt-in class as to liability, is reported at 220 F.R.D. 195 (S.D.N.Y. 2003). A1 The decision of the Court of Appeals decertifying the class is reported at *Rudolf Kern v. Siemens Corporation*, 393 F.3d 120 (2d Cir. 2004). A29

JURISDICTION

Jurisdiction in the District Court was conferred by 28 U.S.C. §1332. The Second Circuit's jurisdiction derived from Fed.R.Civ.P. 23(f) as a discretionary appeal from a District Court decision certifying a class. The Second Circuit filed its decision on December 20, 2004. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Second Circuit's decision on a Writ of Certiorari.

FEDERAL RULE INVOLVED

In pertinent part, Rule 23(c) and (d) of the Federal Rules of Civil Procedure state:

> **(c)(2)(B)** For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:
>
> * * *
>
> • that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
>
> • the binding effect of a class judgment on class members under Rule 23(c)(3).
>
> * * *
>
> **(c)(4)** When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, ...
>
> * * *

> **(d)** In the conduct of actions to which this rule applies, the court may make appropriate orders: ... (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; . . . .

STATEMENT OF FACTS

This action arises from a tragic ski train fire that occurred in Kaprun, Austria on November 11, 2000 resulting in the death of 155 persons. Petitioners, Plaintiffs below, allege that the ski train and the tunnel through which it traveled were improperly designed, constructed, maintained, and operated. The tunnel had no escape path, no emergency lighting, no ventilation, no emergency exits, and no sprinkler system or other emergency response system. The train also lacked sprinklers and emergency exits; indeed, its windows were virtually unbreakable. Moreover, the train was built without any means for passengers to communicate with control booth operators. Thus, virtually all of the 155 Kaprun victims were quite literally sealed in fiery boxes, unable even to call for help, left only to scream until death silenced them. Among the dead were eight Americans and 147 non-Americans.

Class action lawsuits were filed by the American Plaintiffs in several districts in the federal courts before being consolidated by the Panel on MultiDistrict Litigation in the Southern District of New York. The original Defendants were over 20 American, German, Austrian and Italian companies. The District Court found that an American court was an appropriate forum and denied motions to dismiss based on the defense of *forum non conveniens*. However, the District Court dismissed a majority of the Defendants for lack of personal jurisdiction and other defenses.

Petitioners moved the District Court to certify an opt-in class limited to liability to ensure consent of all non-American Plaintiffs to litigate in an American forum. The District Court found that "class members have a strong interest in not pursuing their own claims [abroad] because few can afford to bring such a complex suit against foreign defendants on their own." A17 The District Court further found, "all putative class members stand in the same position vis-a-vis the defendants with respect to liability." *Id.* Yet, sensitive to the Austrian Respondents' concern that Austrian courts might not recognize an American judgment, the District Court certified an opt-in class as to liability consisting only of those claimants who: (a) seek to join this action (and thus agree to be represented by Class Counsel), (b) agree not to attack collaterally a defense verdict (should one be rendered here), and (c) accept the risk that a plaintiff verdict (on liability issues) may be treated only as evidence of Respondents' blameworthiness by foreign courts. A19 The District Court then devised a class notice that not only apprized class members of the nature of the action, but required class members to consent to specific conditions. The class notice was translated into five languages and mailed to relatives of the 155 decedents. Relatives of 117 decedents, three-quarters of the 155 who perished, consented to the Court's conditions and returned the opt-in notice.

Respondents filed an interlocutory appeal of the class certification decision pursuant to Fed.R.Civ.P. 23(f). The Second Circuit reversed and decertified the class, holding that an opt-in class is prohibited by Rule 23. A29

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE WHETHER RULE 23(b)(3) CLASSES MAY BE CERTIFIED ON AN OPT-IN BASIS IN APPROPRIATE CIRCUMSTANCES

An opt-out class is – and should be – the norm in routine (b)(3) commercial class actions arising under the securities or antitrust laws. Yet in mass disaster cases, opt-in class actions represent an intelligent and permissible exercise of a court's equitable discretion under Rule 23. The liability phase of a

mass disaster case is especially well suited for class action treatment since it enables both plaintiffs and defendants to train their resources on a single trial. The opt-in procedure provides injured parties the opportunity to affirmatively decide whether to join the class as opposed to filing their own action or perhaps filing no action at all. Instead of multiple trials, a court can focus its energy and resources on a single trial. Particularly in litigation of international breadth, where the binding effect of American judgments may be uncertain, such an opt-in procedure can add needed certainty. *See, e.g., Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 997 n. 48 (2nd Cir. 1975).

This Court has never addressed whether an opt-in class is permitted under Rule 23(b)(3) although it has rejected the argument that an "opt-in" class is constitutionally required. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). In *Shutts*, this Court quoted the Reporter for the 1966 Amendments to the Federal Rules of Civil Procedure: "[R]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step." *See Shutts*, 472 U.S. at 813 n. 4 (quoting Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 Harv. L. Rev. 356, 397-398 (1967)). Obviously the *Shutts* rationale is inapplicable to the liability phase of mass disaster cases where class members have great financial and emotional stake in their individual claims.

An opt-in Class limited to liability is appropriate in this action for three main reasons. First, non-American Class members must accept the risk that, if they are required to litigate damages in Austria, an American judgment may only be *evidence* of a Defendant's liability. A17-18 Second, the opt-in procedure avoided any question as to whether Class members received adequate notice—another issue likely to arise in class actions with foreign class members. Third, the opt-in procedure provides assurance that absent Class members desire to

be represented by Class Counsel – a concern that often arises in the context of serious personal injury claims.

Opt-in classes do not contravene any important public policy considerations. Indeed, opt-in classes are common in two contexts. First, Congress has required them in federal wage and hour litigation. *See* 29 U.S.C. §216(b). Second, whenever class members are required to submit claim forms opt-out classes are essentially converted to opt-in classes. *See* Federal Judiciary Center, Rule 23 Study (reproduced in Appendix XI to Newberg on Class Actions, (4th ed.) at §12(a)). Opt-in classes have been analogized to "permissive joinders and intervention." *See* 3 Alba Conte & Herbert B. Newberg, Newberg on Class Actions §7:41 (4th ed. 2002). These procedural techniques "were developed by equity" in order to manage complex actions, such as this one. *See, e.g.*, Jack B. Weinstein and Eileen B. Hershenov, "The Effect of Equity on Mass Tort Law," 1991 U. Ill. L. Rev. 269, 275 (1991). Particularly in light of this underpinning in equity, a court may not "simply close its doors to [class action] litigants because their actions present novel and difficult questions." *In re Coordinated Proceedings in Antibiotics Antitrust Actions*, 333 F. Supp. 278, 289 (S.D.N.Y. 1971). The District Court honored this admonition and should have been permitted to proceed with the liability class that it certified under Rule 23(b)(3). The recent emphasis of the Executive and Legislative branches of government on improving the fairness of class action supports a recognition that Rule 23 permits opt-in classes in special circumstances.

THE SECOND CIRCUIT DECISION IS CONTRARY TO THE TEXT OF RULE 23 AND WELL REASONED DECISIONS OF OTHER CIRCUIT AND DISTRICT COURTS

Rule 23(c)(2)(B) directs a district court certifying a class to state in the class notice when and how class members may exclude themselves from the class. However, Rule 23(d) gives a court discretion to design class notice "for the fair conduct of the action" and to permit class members to "intervene" or "come into the action." In this case, the District Court exercised its equitable discretion to conclude that "the fair conduct of the action" required class members to "come into the action." A23

Certainly Rule 23 contains no prohibition of opt-in classes. Requiring class members to exclude themselves by taking no action is fully consistent with the notice requirement of Rule 23(c)(2)(B) wherein the emphasis is on notice to class members that they can exclude themselves from (b)(3) classes. The Respondents in this case benefitted from the greater degree of certainty that class members truly wished to be represented in the action as opposed to being included by default.

Decisions by other courts support this position and are inconsistent with the Second Circuit's decision. In *Kyriazi v. Western Electric Company*, 647 F. 2d 388 (3rd Cir. 1981), the Third Circuit considered the appeal of eleven class members who claimed that they had been improperly excluded from participating in an employment discrimination class action settlement fund because they had failed to submit timely claim forms. The *Kyriazi* appellants asserted that the obligation to complete claim forms constituted an impermissible opt-in obligation. In response, the Third Circuit noted that, while the class in question had been certified under Rule 23(b)(2) which usually does not engender any right to opt-out, the monetary (backpay) payments in question were suggestive of a 23(b)(3) class and certainly raised related due process concerns. *Id.* at 392-394. Nevertheless, the court concluded that requiring class members to opt-in by filing a claim form, before any decision had been made regarding their own entitlement to monetary relief, was a permissible exercise of the trial court's discretion. In so holding, the Third Circuit emphasized the ability of a District Court to make orders requiring putative class members to "intervene and present claims or defenses or otherwise to come into the action." *Id.* at 394 (quoting Rule 23(d)(2)). The *Kyriazi* Court further instructed that, while the framers of Rule 23 preferred an opt-out procedure, complete passivity among absent class members was not required. Requiring some affirmative action by absent class members was permissible so long as there was clear notice and an adequate "incentive for participation." *Id.* at 395. Such is the plain meaning of Rule 23(d)(2).

Several other decisions illustrate that opt-in procedures may be employed in special circumstances so long as they are

not unduly burdensome and class members have adequate incentive to employ them. For example, in *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391, 403-04 (S.D. Iowa 1968), a price- fixing action, the court required that the local governments consent to their inclusion within the class and to their representation by the State Attorney General. In granting this latter request, the court adopted the same construction of Rule 23 which is urged here (and which was followed by the District Court in this action):

> Rule 23(c)(2) does not prohibit the suggested procedure since the rule does not limit the matters that may be included within the notice. The authority to employ the requested procedure is implied in Rule 23(d).

Id. at 403. In *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968), antitrust claims were pursued on behalf of two groups that arguably had different priorities – private companies and governmental entities. The court reasoned, with marvelous clarity, that in some class actions opt-in provisions may be necessary in order to avoid "a return to one-way intervention under a new guise." *Id.* More particularly, the *Anaconda* court found that, in the event of a defense verdict, the private companies might argue that they had not been adequately represented by the named plaintiff (a state government official). The court's colloquial wisdom still rings true today and well supports the District Court's opt-in procedure used here:

> The difference between "I will intervene if our side has already won" [i.e., old Rule 23 one-way intervention] and "If I find out our side has lost I will collaterally attack the judgment on due process grounds" [i.e., *de facto* one-way intervention under modern Rule 23] may not be very great.

Id. at 459. In order to avoid a due process challenge in the future, the *Anaconda* court employed an opt-in provision.

Other courts recognize their authority under Rule 23(d) to employ an opt-in provision in special circumstances. *See Snell*

v. Allianz Life Ins. Co. of North America, 327 F.3d 665, 669-670 (8th Cir. 2003) (settlement class that required members to opt-in to obtain certain benefits was a "sensible precaution" against miscommunications); *Spark v. MBNA Corp.*, 157 F. Supp. 2d 330, 340 (D. Del. 2001) (opt-in procedure "reflect[ed] a fair and reasonable balancing of a number of competing factors"), *aff'd without opinion*, 2002 WL 31059209 (3rd Cir. Sept. 16, 2002); see also *Robinson v. Union Carbide Corp.*, 544 F. 2d 1258 (5th Cir. 1977)(recognizing authority); *Enterprise Wallpaper Mfg. Co. v. Bodman*, 85 F.R.D. 325, 327 (S.D.N.Y. 1980) (recognizing authority).

CONCLUSION

The Court should grant this petition for a Writ of Certiorari and reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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In re SKI TRAIN FIRE IN KAPRUN, AUSTRIA ON NOVEMBER 11, 2000.

No. MDL 1428, 01 Civ. 3103, 01 Civ. 6554, 01 Civ. 10776, 02 Civ. 2492

United States District Court, S.D. New York.

Oct. 9, 2003.

As Corrected Oct. 14, 2003.

CORRECTED OPINION AND ORDER

SCHEINDLIN, *District Judge*

Almost three years ago, a ski train caught fire in a tunnel of the Kitzsteinhorn Mountain in Kaprun, Austria,[1] killing 155 passengers and crew members. Plaintiffs, the parents, spouses, and grandparents of eight Americans who died in the fire,[2] have sued train and train part manufacturers and operators for damages, declaratory, and injunctive relief. Plaintiffs allege that the train and tunnel were improperly designed, constructed and maintained, as well as negligently operated and promoted. Plaintiffs additionally allege, among other things, that defendants fraudulently misrepresented the safety of the train and tunnel and intentionally interfered with the victims' rights.

Plaintiffs' actions against the various defendants have been consolidated before this Court for pretrial purposes by the Judicial Panel on Multidistrict Litigation ("MDL Panel").[3] Plaintiffs now seek class certification, pursuant to Federal Rules of Civil Procedure ("Rules") 23(a), 23(b)(2) and (3), with respect to *liability issues only.* The putative class is defined as "[a]ll heirs, beneficiaries and personal representatives" of all individuals who died in the fire "who consent to inclusion."

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1. The train consisted of two counter-balanced funicular cars; one going up the mountain and the other coming down the mountain. *See* Plaintiffs' Motion For Class Certification of Liability Issues ("Pl.Mem.") at 2.

2. Plaintiffs John and Suzanne Habblett, Clair Goodridge, Harold and Carole Baker, Rudolph and Angela Kern, and Karen Filkil bring this action on behalf of the estates of Jennifer Hablett Goodridge, Michael C., Michael J., and Kyle Goodridge, Carrie Baker, Erich Kern, and Paul and Benjamin Filkil, respectively.

3. This Court's jurisdiction is based on diversity of citizenship pursuant to 28 U.S.C. § 1332. *See In re Ski Train Fire in Kaprun, Austria on November 11, 2000 (Waagner-Biro Defendants)*, 257 F.Supp.2d 717, 724-26 (S.D.N.Y.2003) (*"Kaprun Waagner"*) (finding complete diversity of citizenship of all potential class representatives).

Defendants Siemens AG, Siemens Corporation, Bosch Rexroth Aktiengesellschaft, Bosch Rexroth Corporation, Waagner-Biro Binder AG in Abwicklung, Waagner-Biro Binder Beteilingungs AG, Waagner-Biro Holding AG, Binder + Co. AG, and Omniglow Corporation (collectively, "defendants") oppose certification on a number of grounds.[4] For the reasons set forth below, plaintiffs' motion is conditionally granted.

I. STANDARD FOR CLASS CERTIFICATION

[1-3] Rule 23 sets forth the requirements for bringing and maintaining a class action in federal court. See Fed.R.Civ.P. 23; *see also* infra Part III. "'In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.'" *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 133 (2d Cir.2001) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974)). While this Circuit has "directed district courts to apply Rule 23 according to a liberal rather than a restrictive interpretation,' *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 504 (S.D.N.Y.1996) (citing *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208-09 (2d Cir.1972)), a court may not grant certification unless it is satisfied, after "'rigorous analysis,'" that the criteria set forth in Rule 23 are met. *See Dodge v. County of Orange*, 208 F.R.D. 79, 87 (S.D.N.Y.2002) (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). Plaintiffs bear the burden of establishing each requirement for class certification. *See Dunnigan v. Metropolitan Life Ins. Co.*, 214 F.R.D. 125, 133 (s.D.N.Y.2003) (citation omitted).

[4, 5] The district court must accept all of the allegations in the pleadings as true on a motion for class certification, and avoid conducting a preliminary inquiry into the

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4. On May 12, 2003, this Court ruled that any defendant who opts not to participate in the class certification briefing because of a pending jurisdictional motion—e.g., Gletscherbahnen Kaprun AG—may later move to reopen the issue of class certification to raise a new issue. See Transcript of 5/12/03 Conference at 31-32.

merits. *See In re Independent Energy Holdings PLC* Sec. Litig., 210 F.R.D. 476, 478 n. 5 (S.D.N.Y.2002) (citations omitted). Nonetheless, the decision whether to certify a class "may involve some considerations related to the factual and legal issues that comprise the plaintiff's cause of action." *Dunnigan*, 214 F.R.D. at 133 (internal quotation marks and citation omitted). *See also Daniels v. City of New York*, 198 F.R.D. 409, 413 n. 5 (S.D.N.Y. 2001) (noting that the court need not rely on the bare allegations but "may consider the range of proof necessary to support class certification"). "[A]ffirmative defenses should [also] be considered in making class certification decisions." *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F./3d 288, 295(1st Cir.2000). See also *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir.1996) (explaining that "a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues").

II. POWER OF COURT TO CERTIFY A CLASS IN A MULTI-DISTRICT LITIGATION

[6] Before addressing the specific requirements for class certification, defendants argue that the Court is not statutorily authorized to certify transferred cases as class actions.[5] See Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification ("Def.Mem") at 3-6 (arguing that Section 1407 of Title 28 of the United States Code ("Section 1407") does not grant such authority). Defendants are absolutely wrong.

This court has jurisdiction, pursuant to Section 1407(a), over all "coordinated or consolidated pretrial proceedings." *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 175 F.Supp.2d 1379, 1379 (J.P.M.L. 2001) ("MDL Order"). This grant of jurisdiction empowers the Court to "rule[ ] on a wide range of preliminary legal and factual questions," including class

5. The complaints in all but the recently transferred and/or filed actions (e.g., the Filkil action) have been consolidated into one class action complaint.

certification.[6] 15 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 3866 (2d ed. Supp.1999) ("Fed.Prac. § 3866"); see also *In re Plumbing Fixture Cases*, 298 F.Supp. 484, 494 (J.P.M.L.1968) (noting that the Manual for complex and Multidistrict Litigation lists the determination of class action issues within the description of pretrial proceedings). In fact, motions for class certification are "particularly suited for decision by the transferee court because it is important there not be a conflict between or among the transferor courts as to how related actions are to be treated." Fed.Prac. § 3866 at 619; *see also In re New York City Mun. Sec. Litig.*, 439 F.Supp. 267, 270 (J.P.M.L.1977) ("[T]here is no reason, in light of the overriding factors here favoring coordinated or consolidated pretrial proceedings in a single district, why the class determinations regarding the [transferred] actions should not be made by the transferee judge. Indeed, the transferee judge's participation in this important pretrial process will better enable [her] to coordinate the pretrial proceedings . . ."). If the transferee court did not have authority to decide issues of class certification, the determination of whether a suit may proceed as a class action could not be made "[a]s soon as practicable after the commencement of an action brought as a class action," as required by Rule 23(c)(1).[7]

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6. Once the pre-trial proceedings in this multi-district litigation are concluded, the actions will be transferred back to the districts in which they were originally brought and tried there as class actions. The actions that were brought in the Southern District of New York will be tried in this Court. No defendant will be required to stand trial in more than one jurisdiction.

7. Defendants acknowledge that transferee courts frequently certify classes in MDL cases, but argue nonetheless that these courts lack the authority to do so based on the Supreme Court's "restrictive reading" of Section 1407 in Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998). Def. Mem. at 5. Lexecon in no way circumscribes a transferee court's ability to certify a class. See In re New England Mut. Life Ins. Co. Sales Practices Litig., 183 F.R.D. 33, 44 (D.Mass.1998) ("Nothing in Lexecon and no implication from Lexecon's holding indicates that this court may not certify a class" to "advance pretrial preparations so that the transferor courts will not have to repeat, case by

III. REQUIREMENTS FOR CLASS CERTIFICATION

To be certified as a class under Rule 23, plaintiffs must satisfy all requirements of subsection (a) and must prove that the class is "maintainable" as defined in subsection (b).

A. Rule 23(a)

[7] Rule 23(a) permits one or more members of a class to sue as representative parties only if "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a). Because it is clear that the proposed class meets the first three requirements, and defendants do not seriously argue otherwise,[8] I address only the fourth requirement—adequacy of representation.

[8, 9] In order to demonstrate adequate representation, plaintiffs must show that: (1) class counsel is qualified, experienced, and generally able to conduct the litigation; and (2) the named plaintiffs' interests are not antagonistic to those of the proposed class members. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d. Cir. 1992). The purpose of this inquiry is to discover any conflicts of interest between the class representative and the class, as well as any conflicts or incompetency on the part of class counsel. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 626 n. 20, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). In determining the adequacy of counsel, the court may look "beyond reputation built

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case, all the preparation that will have been completed before the MDL cases are remanded."). The case merely limits a court's ability to transfer cases consolidated for pretrial MDL proceedings to itself for trial under 28 U.S.C. § 1404(a). See Lexecon, 523 U.S. at 40-41, 118 S.Ct. 956. Thus, there is no reason for this court to depart from the unanimous legal authority supporting class certification in a multi-district litigation.

8. Defendants state "it is far from clear that plaintiff satisfies all the requirements of Rule 23(a)," but substantively address only the adequacy of representation requirement. Def. Mem. at 7.

upon past practice and examine[ ] counsel's competence as displayed by present performance." *In re Towers Fin. Corp. Noteholders Litig.*, 177 F.R.D. 167, 171 (S.D.N.Y.1997) (internal quotation marks and citation omitted).

Defendants challenge both the adequacy of the proposed class representative, Lieutenant Colonel John S. Habblett, and the proposed class counsel.[9] *See* Def. Mem. at 8-12. With respect to Lieutenant Habblett, defendants argue: (1) that he is not qualified to be the class representative because he lacks standing to assert the claims in the complaint, see 10/1/03 Letter to the Court from Brant W. Bishop, counsel for Siemens AG and Siemens Corporation ("10/01/03 Bishop Ltr."); [10] and (2) that Habblett's lack of knowledge about certain aspects of the case and reliance on the advice of counsel make him an

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9. After the filing of defendants' opposition to class certification, a disagreement arose among plaintiff's counsel regarding who should be lead counsel and class representative. *See* Plaintiffs' Reply In Support of Class Certification of Liability Issues ("Pl. Reply Mem.") at 6 (stating that the named plaintiffs wish to have only Robert Swift and Jay Rice certified as class counsel—to the exclusion of Edward Fagan—and Habblett certified as sole class representative). Fagan proposes that he be appointed co-lead class counsel with Swift and Rice and that *all* United States plaintiffs be appointed class representatives. *See* 8/4/03 Supplemental Reply Declaration of Edward D. Fagan In Further Support of class Certification ("Fagan Supp. Dec.") ¶ 7. However, the Bakers and Kerns do not wish to be considered co-class representatives. *See* 8/22/03 Letter to the Court from Rice at 2. Clair Goodridge is willing to serve as class representative with any of the other American plaintiffs, but not by himself. *See* 9/11/03 Letter to the Court from Christina Fry ("9/11/03 Fry Ltr.") at 2. The only other American plaintiff, Filkil, joined the case less than three months ago and has not yet weighed in on the issue. *See* Filkil Complaint, filed in the Eastern District of Texas on June 25, 2003, and transferred to this Court by the MDL Panel on July 11, 2003. In any event, Habblett refuses to share the responsibility with either Goodridge or Filkil. *See* 9/9/03 Letter to Rice from Habblett ("Habblett Ltr."), attached to 9/11/03 Letter to the Court from Rice (stating that he does not believe Goodridge or Filkil possess "the attributes required . . . to be a strong [c]lass [r]epresentative" and therefore "will not accept appointment as co-class representative"). Thus, the only possible class representative at this time is Habblett.

10. Defendants made this argument after briefing on the class certification motion was completed in response to an inquiry by the court. *See* Transcript of 9/30/03 Conference Call ([9/30/03 Tr."). However, the issue was previously raised by the Waagner defendants in their motion to dismiss, at which time the Court held that the issue was not ripe for determination. *See Kaprun Waagner*, 257 F.Supp.2d at 727.

inadequate class representative, *see* Def. Mem. at 12 (noting that Habblett lacked "personal knowledge" about the "specific liability claims to be advanced" by potential class members). Defendants further contend that plaintiffs' then proposed lead counsel, Fagan, lacks the "qualifications and conduct" necessary to effectively represent the interests of the class. *Id.* at 8; *see generally id.* at 8-11 (citing public criticism of Fagan's responsiveness to his clients in prior cases). They also attack Swift and Rice as lacking experience in class action products liability actions. *See id.* at 10 n. 2.

1. ADEQUACY OF CLASS REPRESENTATIVE

a. Habblett's Standing

[10-12] Upon certification of a class, a plaintiff seeking to act as class representative must have standing to assert the claims in the complaint against each defendant being sued. *See Martens v. Thomann*, 273 F.3d 159, 173 n. 10 (2d Cir.2001) (citing 3 Newberg on Class Actions § 2.06 (1992)); *Ramos v. Patrician Equities Corp.*, 765 F.Supp. 1196, 1199 (S.D.N.Y.1991) (citations omitted). To have standing, a plaintiff must suffer an actual or threatened injury, thereby satisfying the case or controversy requirement of Article III of the United States Constitution. *See Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir.1997) (citing *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). A decision in the plaintiff's favor must provide redress for the alleged injury in order for the injury to be considered actual. *See id.* at 330. Thus, if plaintiff has not suffered a distinct injury that can be remedied by a court, he lacks standing to sue. *See id.*

[13] In order to determine whether Hablett has standing to sue, the first question that must be addressed is what law applies to Habblett's wrongful death claim. A district court sitting in diversity applies the law of the forum state. *See In re Ski Train Fire in Kaprun, Austria on November 11, 2000 (Bosch Rexroth)*, 230 F.Supp.2d 392, 400 (S.D.N.Y.2002) (citations omitted). In an MDL proceeding, "the forum state . . . is

the district court where the action was originally filed." *Id.* There is more than one forum state here because Habblett brought suit in multiple jurisdictions including New York, Colorado, Florida, Massachusetts, Pennsylvania, and Florida. However, because the majority of the actions were brought in the Southern District of New York, New York choice of law rules apply.

[14] New York's rules require that a court first determine whether there is a conflict in the laws of the various fora selected by the plaintiffs. If there is a conflict, the court must classify the conflicting laws by subject matter and then look to New York law to determine which state's substantive law applies. *See In re Ski Train Fire in Kaprun, Austria on November 11, 2000 (Siemens AG)*, 230 F.Supp.2d 376, 389 (S.D.N.Y. 2002) *("Kaprun Siemens AG")* (citations omitted).

There is a conflict here. Under Texas law, unlike New York and Florida law, a wrongful death action does not have to be brought by a person who has been appointed personal representative. Compare N.Y. Est. Powers & Trusts Law § 5-4-1. *with* Fla. Stat. § 768.20. Substantive law sounding in tort requires the Court to apply the law of the state which has the greatest interest in the outcome. See Kaprun Siemens AG, 230 F.Supp.2d at 390. Because the Last Will & Testament of Jennifer Habblett Goodridge was executed and probated in Texas, that state appears to have the greatest interest in determining who may pursue the claims of her estate. *See Emmerich v. May*, 130 F.Supp. 426, 429 (S.D.Y.Y.1955) ("The administration of assets . . . within a state is governed by the law of that state.'); *Thomas v. United Air Lines, Inc.*, 24 N.Y.2d 714, 724, 301 N.Y.S.2d 973, 249, N.E.2d 755 (1969) ("The predominant interests to be served on the issue of damages are those of the states containing the people or estates which will receive the recoverable damages, if any, for their injuries or their decedent's death."). Thus, as the parties acknowledge, Texas law applies to the standing issue.

Texas's wrongful death statue provides, in relevant part, as follows:

> (a) An action to recover damages as provided by this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased.
>
> (b) The surviving spouse, children, and *parents* of those decreased may bring the action or one or more of those individuals may bring the action for the benefit of all.

Tex. Civ. Prac. & Rem.Code § 71.004 (emphasis added). Because Habblett is the parent of Jennifer Habblett Goodridge, he has standing to bring a wrongful death suit even though he is not the personal representative or administrator of her estate.[11]

b. Habblett's Knowledge of the Case

[15] Class certification may be denied "'where the class representative[ ] ha[s] so little knowledge of an involvement in the class action that [he] would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys'" *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077 (2d Cir.1995) (quoting *Kirkpatrick v. J.C. Bradford & Co.* 827 F.2d 718, 727 (11th Cir. 1987)). However, the problems alleged must either pertain to issues "central to the plaintiffs' case," or they "must be so substantial that they threaten to undermine plaintiffs' case as a whole." *Harrison v. Great Springwaters of Am., Inc.*, No. 96 Civ. 5110, 1997 WL 469996, at *6-*7 (S.D.N.Y. June 18, 1997); *see also Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 201 (S.D.N.Y.1992) (finding class representative adequate even through he was unaware of the nuances of the legal theory in the case).

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11. The cases cited by defendants are inapposite because they relate to Texas's survival statute rather than its wrongful death statute. *See* 10/01/03 Bishop Ltr. at 1 (citing two cases involving lawsuits brought to recover real and personal property belonging to an estate).

A review of Habblett's deposition testimony and affidavits reveals that he has a sophisticated understanding of the litigation and has played an active role in its prosecution. *See, e.g.*, 3/11/03 Deposition of John Habblett ("Habblett Dep."), Ex. 5 to Pl. Reply Mem., at 21 (stating that since the commencement of the litigation, Habblett has traveled to Austria nine or ten times); *id.* at 22 (testifying that he attended part of the Austrian criminal proceedings against some of the defendants); *id.* (stating that he reviewed the class action complaint and class certification motion prior to filing). Moreover, Habblett's recent communication with this Court demonstrates that he understands the class action mechanism and appreciates the responsibilities of a class representative. *See* 9/8/03 Letter to Rice from Habblett, attached to 9/11/03 Letter to the Court from Jay Rice ("9/11/03 Rice Ltr.") (listing necessary attributes of a class counsel and class representative). Nevertheless, the Court has doubts about Habblett's ability to adequately represent the interests of the putative class.

c. Habblett's Unwillingness to Work with Others

Habblett has vehemently demanded that he be appointed the sole class representative, refusing to serve as co-class representative with any of the other American families. *See* Habblett Ltr. at 2.[12] Habblett's unwillingness to share the responsibility with other members of the victim class and the tenacious and demanding tone of this letter suggest that he may be unable to work and communicate effectively with others.[13]

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12. Habblett also stated in his letter that he is unwilling to work with two of plaintiffs' counsel, see Habblett Ltr. at 1 (requesting that he not be appointed class representative if either Fagan or Kenneth Nolan of Speiser, Krause, Nolan & Granito ("Speiser Krause") are appointed class counsel), but has since informed the Court that he no longer objects "to the appointment of the Nolan firm as one of the class counsel, as long as that appointment would be in conjunction with [Rice's firm] and/or [ ] Swift's firm." 9/16/03 Letter to the Court from Rice.

13. Fagan contends that members of the victim class have expressed dissatisfaction with Hablett's level of communication and relationship with them. See 9/11/03 Letter to the Court from Fagan ("9/11/03 Fagan Ltr.") at 2.

Given the complexity of this multi-district litigation against numerous foreign defendants, and the geographic diversity of the victims, the putative class members would be ill-served by a single class representative. Class certification is therefore conditioned upon Habblett's working with another named plaintiff as co-class representative and a committee of foreign class members.[14]

2. Adequacy of Class Counsel

Plaintiffs have adequate class counsel in the combination of the firms Kohn, Swift, & Graf ("Kohn Swift"); Nagel, Rice, & Mazie, LLP ("Nagel Rice"); and Speiser Krause. All three firms have significant experience with various types of class actions, including products liability actions. *See, e.g.*, "KS & G's Philosophy: What We Have Done," Ex. 3B to 8/1/03 Declaration of Hilary Cohen ("8/1/03 Cohen Dec.") (listing at least six products liability cases in which Kohn Swift has served as class counsel); Biography of Bruce Nagel, Ex. 4B to 8/1/03 Cohen Dec. (listing ten class actions in which Nagel Rice has or is currently serving as lead or co-lead counsel); "About Speiser Krause," *available at* http://www.speiserkrause.com/about/ ("Since its inception, our firm, both on its own and as lead counsel or co-counsel with other law firms, has successfully handled thousands of plaintiff cases arising from major disasters. We also pioneered group handling of mass disaster lawsuits in aviation, admiralty and oil rig disasters, hotel fires, rail accidents and other catastrophic occurrences."). Throughout the pendency of this litigation, the attorneys from each of these firms have conducted themselves professionally, complied with all deadlines, and generally met the Court's expectations.

Contrary to defendants' contention, the Court does not find Fagan inadequate to serve as co-lead counsel with the aforementioned firms. In addition to having significant class action experience, *see* Curriculum Vitae of Edward D. Fagan, Ex. D to Pl. Mem., Fagan has been instrumental in keeping the

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14. Should Habblett continue to refuse to work with Goodridge, class certification will depend upon another American class member's (i.e., Filkil, Baker, or Kern's) agreement to serve as co-class representative with Habblett and demonstrating that he or she is qualified.

non-American victim families and their counsel apprised of all issues and developments in the case. *See* Letters to the Court from Helmut and Eve Bieber, Anneliese Ferstl, Britta Lenglacher, and Martin & Renate Niederberger, non-American victim families ("Non-American Victim Ltrs."), Exs. 8-11 to Fagan Supp. Dec. ("Mr. Fagan works closely with our local Austrian lawyers. He discusses with, explains to and consults us about the strategies being undertaken with regard to the prosecution of the U.S. case . . . Mr. Fagan [has] informed us of all developments and decisions of the U.S. Court."); *see also* Letters to the Court from Dr. Jurgen Hinterwirth, Dr. Ulrich Schwab, Dr. Gerald Hass, Dr. Anton Frank, Mag. Ursula Schilchegger-Silber, Mag. Andreas Rabl, Mag. Gerhard Eigner, and Dr. Herwig Hasslacher, counsel for non-American victim families, Exs. 3-7 to Fagan Supp. Dec. (stating that Fagan frequently travels to Austria to meet with the victims, monitor the criminal investigation, and gather information for the case).

Fagan's commitment and dedication to his clients is quite impressive. *See* Non-American Victim Ltrs. ("From the very beginning, Mr. Fagan fought for our rights, for our dignity and to try to help us get information so we could decide for ourselves what should be done with our . . . claims."); 8/4/03 Declaration of Margarete Endl, translator for plaintiffs, Ex. 12 to Fagan Supp. Dec. ("[N]o lawyer has worked as much and as hard to fight for the rights and interests of Kaprun victim families, than Mr. Fagan."). Although there was a problem at one point with Fagan's responsiveness to the Court, *see* Transcript of 3/3/03 Conference at 2-3, Fagan has since adopted an effective means of communication with the Court, which allows him to be in constant contact while abroad.

Nevertheless, the Court cannot appoint Fagan as co-lead counsel because Swift and Nagel have refused to work with him. See 9/10/03 Letter to the Court from Swift. Fagan himself acknowledges that he cannot handle this case alone.[15] *See*

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15. Speiser Krause "has no objections or concerns" about working with Fagan, but will not work with him alone. *See* 9/11/03 Fry Ltr. (stating that they are willing to serve as class counsel with a minimum of two of the existing firms).

9/11/03 Fagan Ltr. at 2 ("While I could rearrange my entire practice to handle the Kaprun case with only one other firm, I do not believe that is in the best interests of the victim class."). Recognizing, however, that the non-American members of the putative class would be better served if Fagan continues to play a role in class-wide issues, certification is conditioned upon class counsel's agreement to work with Fagan as liaison counsel for the non-American class members.

B. Rule 23(b)

Rule 23(b) provides that "an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition" one of three alternative definitions of maintainability, (b)(1)-(3), is met. Plaintiffs argue that this action meets the definitions articulated in subsections (b)(2) and (b)(3). Plaintiffs are correct with respect to subsection 23(b)(3).

1. 23(b)(3)

Rule 23(b)(3) requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

a. Predominance

[16-18] "In order to meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Visa Check*, 280 F.3d at 136 (internal quotation marks and citation omitted). "Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Id.* at 139.

Plaintiffs have identified a myriad of issues of law and fact common to all members of the proposed class, including: whether any of the defendants negligently and defectively

designed and constructed the tunnel, train, or products carried on the train; whether any of the defendants negligently failed to conduct safety inspections of the train; whether any of the defendants negligently operated the train; whether defendants had knowledge of the unsafe conditions of the train and tunnel prior to November 11, 2000; whether any of the defendants promoted the train as a safe means of transport to the ski areas; whether any of the defendants altered, concealed or destroyed evidence from the disaster. *See* Pl. Mem. at 5-6. All of these issues are subject to generalized proof. In fact, the only issue in the case that requires individualized determinations is the calculation of damages.[16] Because plaintiffs seek to certify the class with respect to liability only, there is no question that common issues predominate.

Defendants argue that plaintiffs' claims for deception and fraud, see Consolidated and Amended Complaint ("Am.Compl.") ¶¶367-72, and intentional infliction of emotional distress, *see id.*¶¶378-80, "introduce into the case a host of individualized issues that would overwhelm any common issues." Def. Mem. at 27. I disagree. A fraud suit *may* be unsuitable for class treatment where there is "material variation in the representations made or the kinds of degrees of reliance by the persons to whom they were addressed." Fed.R.Civ.P. 23(b)(3) Advisory Committee Note to 1966 Amendments. There is, however, no variation here in the representations. Thus, class treatment on the fraud claim is appropriate. *See id.* (explaining that "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class").

The same reasoning applies to plaintiffs' claim for intentional infliction of emotional distress. Defendants' alleged conduct, giving rise to this claim, was the same with respect to all

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16. The identification of the members of the class may also require some individualized determinations as to the rightful heirs to the decedents' estates, but those determinations can be made during the damages phase of the litigation. *See infra* Part III.B.1.b.ii.

of the victims. Thus, any individualized determinations will relate to damages—not liability, making the claim appropriate for class treatment.

b. Superiority

[19] The superiority question under Rule 23(b)(3) requires a court to consider whether a class action is superior to other available methods of adjudication. Class actions are the superior method for resolving controversies when the main objects of Rule 23 are served; namely, the efficient resolution of the claims or liabilities of many individuals in a single action. *See Califano v. Yamasaki*, 422 U.S. 682, 701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). The Court should consider, among other things, the interests of individual class members in controlling their own litigation, the extent of other litigation arising from the same accident, the desirability of concentrating the litigation in the forum, and the potential management difficulties. *See* Fed.R.Civ.P. 23(b)(3).

i. Interests of Individual Class Members

Traditionally, courts have been reluctant to apply the class action device to mass accident litigation. *See Manual for Complex Litigation*, § 33.24, at 298 (2d. ed.1985). The comment to Rule 23(b)(3) explicitly cautions against the use of the class action device in mass tort cases. See Fed.R.Civ.P. 23(b)(3) Advisory Committee Note to 1996 Amendments ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways."). The Second Circuit has explained its "skepticism over the usefulness of class actions in so-called mass tort cases" as resulting, in part, from the likelihood that plaintiffs in mass tort cases do not share common interests because of differences in the strength of their claims:

> If plaintiffs with strong claims remain members of the class, they may see their claims diluted because a settlement attractive to the defendants will in all likelihood

> occur . . . If the strong plaintiffs opt out, however, the efficiencies of a class action may be negative. The class would then consist largely of plaintiffs with weak cases, many or most of which should never have been brought. the defendants would be unlikely to settle with the class . . . and [b]oth the class action and the strong cases would then have to be tried.

In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 166 (2d Cir.1987); *see also* 7B Charles A. Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice and Procedure, § 1783, at 115 (1972) ("Fed.Prac. § 1783") ("When personal injury and death claims are involved, a strong feeling prevails that everyone enmeshed in the dispute should have his own day in court and be represented by a lawyer of his choice."). It is not surprising, therefore, that a large number of courts have refused to certify a class in mass tort situations. *See, e.g., In re Northern Dist. of Col. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir.1982); Marchesi v. Eastern Airlines, 68 F.R.D. 500 (E.D.N.Y.1975); *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D.Pa.1970).

[20] Two of the leading authorities in the field of federal practice have suggested, however, that class action treatment is beneficial for determining liability in some cases arising out of mass disasters—*e.g.*, those in which there is little chance that defendants will assert unique defenses directed to some plaintiffs but not others. *See* Fed. Prac. § 1783, at 117; 3B J. Moore, *Federal Practice* ¶23.45(3), at 23-811 n. 35 (2d ed.1974). More recently, there has been a growing recognition among courts that, under some circumstances, mass accident litigation may and probably ought to be maintained as a class action. *See, e.g., In re "Agent Orange"*, 818 F.2d at 166-67 (finding certification justified in order to prevent the relitigation of critical common defenses applicable to the entire plaintiff class); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir.1986) (finding class certification in mass -tort case "superior to the alternative of repeating, hundreds of times over, the litigation" of defendants' defense); *Petition of Gabel*, 350 F.Supp. 624, 627 (C.D.Cal.1972) (holding in a multi-district airplane

accident case that the issue of liability could be addressed in a class action, with damages trials to be returned to the transferor courts). Class action treatment is appropriate in situations where: (1) the class action is limited to the issue of liability; (2) the class members support the action; and (3) the choice of law problems are minimized. *See Causey v. Pan Am. World Airways, Inc.*, 66 F.R.D. 392, 397 (E.D.Va.1975).

This is a case in which class treatment would not only be appropriate, but also beneficial. *First*, the class action is limited to liability. *Second*, all putative class members stand in the same position vis-a-vis defendants with respect to liability, making it unlikely that defendants will assert any individul defenses. *Third*, because there is no disparity in the strength of plaintiffs' liability claims, there is little risk that they will want to pursue their own claims.[17] On the contrary, class members have a strong interest in not pursuing their own claims because few can afford to bring such a complex suit against foreign defendants on their own.[18] See Kaprun Siemens Ag, 230 F.Supp.2d at 389 (recognizing that the "names plaintiffs have only modest means and would suffer hardship if forced to litigate in Austria"). In fact, the cost savings to plaintiffs are so great that the non-American plaintiffs are willing to take the risk that, when they litigate damages in their own countries[19]

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17. To date, the Court has not been made aware of any other litigation arising from the Kaprun ski train fire.

18. Almost two-thirds of the victim families have expressed interest in participating in the class action. See 12/10/02 Declaration of Edward Fagan in Support of Plaintiffs' Motion for Class Certification, Ex. 11 to Pl. Reply Mem., ¶ 7 (stating that twenty-one to twenty-four victim families have agreed to participate through German counsel, fif-six through Austrian counsel, and six through American counsel); 9/18/03 Letter to Dr. Ivo Greiter, local Austrian counsel, from Professor Dr. Toichiro Kigawa, counsel for Japanese victim familes (stating that all ten Japanese families wish to join the class action).

19 The non-American plaintiffs will be unable to bring their damages actions against the foreign defendants in the United States because there is no diversity jurisdiction over a foreign plaintiff suing a foreign defendant in the United States. To the extent that any of the defendants are United States citizens, the non-American plaintiffs will be able to bring their damages actions against them in the United States on diversity grounds.

(presuming they win on liability in the United States), the American judgment of liability may not be recognized, thereby requiring them to relitigate liability.[20] *See* 10/07/03 Tr. (stating that the non-American plaintiffs are confident that the admission of a finding of liability from this Court will be persuasive evidence of liability in a foreign court, making it easier for them to litigate liability on their own). Because the putative class members do not have the wherewithal to individually litigate defendants' liability, *see Kaprun Siemens* AG, 230 F.Supp.2d at 389, the class action mechanism is the superior method for adjudicating defendants' liability. See *Amchem Prods.*, 521 U.S. at 617, 117 S.Ct. 2231 (acknowledging that Rule 23(b)(3) is designed to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all") (internal quotation marks and citation omitted).[21]

ii. Potential Management Difficulties

Defendants contend that plaintiffs' class definition is fraught with management difficulties, making class treatment an inferior method for adjudicating plaintiffs' claims of liability. *See* Def. Mem. At 15-20 In particular, defendants argue that in order to determine class membership, the Court must engage in numerous individualized determinations to ascertain whether each prospective member is the legal "heir,

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20. The risk is one-sided. Although plaintiffs have agreed to waive their right to re-litigate liability in the event of an adverse judgment, *see infra* Part III.B.I.b.iv., defendants have not agreed to do so and will likely seek to re-litigate liability in any damages actions brought in foreign jurisdictions. See Transcript of 10/07/03 Conference Call ("10/07/03 Tr."). Thus, if plaintiffs lose on the issue of liability, they will not have a second bite at the apple, where as if defendants lose, they will have an opportunity to litigate liability in each of the foreign jurisdictions in which damages actions are brought.

21. I recognize that class certification will allow many non-Americans to take advantage of this country's legal system and its class action device, which is unavailable in many foreign jurisdictions. However, because I have found that: this Court has jurisdiction over defendants; this forum is appropriate; and class certification is the superior method for adjudicating defendants' liability; this result is a necessary consequence of the application of American procedural and class action rules.

beneficiar[y][or] personal representative" of the estate of someone who perished in the fire, thereby requiring the Court "to sit as a probate court as to each decedent." Def. Mem. at 16.

Although class certification requires that it be "administratively feasible for the court to determine whether a particular individual" is a class member, *Rios v. Marshall*, 100 F.R.D. 395, 403 (S.D.N.Y.1983) (internal quotation marks and citation omitted), there is no need for the Court to reach this issue now. The determination of which heir (or heirs) of the decedents is entitled to a judgment can be decided during the damages phase of the trial.[22]. At this juncture, it is only necessary that the potential class representatives demonstrate that they are heirs, beneficiaries, or personal representatives of a decedent's estate and have standing to bring a wrongful death action, which they have done. *See* 9/30/03 Tr. (stating that Habblett is a beneficiary of Jennifer Habblett Goodridge's estate, as well as his grandchildren's estates); Letters of Administration, Circuit Court of Pinellas County, Florida, attached to 9/11/03 Rice Ltr. (appointing Harold Richard Baker as the personal representative of the state of Carrie Lynn Baker); Letters Testamentary, Probate Court of Madison, Alabama, attached to 9/11/03 Fry Letter (appointing Clair Goodridge as the personal representative of Michael C. Goodridge's estate); Letters of Administration, Probate Court of Madison, Alabama, attached to 9/11/03 Fry Ltr. (appointing Goodridge as the personal representative of Michael J. and Kyle Goodridge's estates).[23]

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22. The Court recognizes that, where there are disputes as to who is the proper beneficiary of a decedent's estate, the matter may have to be referred to the appropriate probate court. *See Dulce V. Dulce*, 233 F.3d 143, 145 (2d Cir.2000) ("[A] federal court has no jurisdiction to probate a will or administer an estate.") (citing *Markham v. Allen* 326 U.S. 490, 494, 66 S.Ct. 296, 90 L.Ed. 256 (1946)).

23. Plaintiffs have not yet submitted proof with respect to the Kerns or Filkils. Although Rudolph Kern is named in Erich Kern's will as the executor of his son's estate, *see* Last Will and Testament of Erich Rudolph Kern, attached to 9/11/03 Rice Ltr., Mr. Kern has not yet applied for or been granted Letters of Administration. The Filkils have only recently joined the case.

iii. Superiority of Forum

Both the MDL Panel and this Court have previously ruled that the Southern District of New York ("SDNY") is the preferable forum in which to consolidate plaintiffs' claims for pretrial purposes. *See* MDL Order (observing that the SDNY is the forum of choice of all plaintiffs and "provides a convenient forum for a litigation involving an incident overseas and numerous foreign defendants"); *Kaprun Siemens AG*, 230 F.Supp.2d at 391 (rejecting defendants' motion to dismiss on the grounds of forum non conveniens). The determination of the appropriateness of a particular forum for the maintenance of a class action is based on similar considerations *See Hobbs*, 50 F.R.D. at 80 n. 6 ("In determining the appropriateness of a particular forum [pursuant to Rule 23(b)(3)], it would seem proper to utilize considerations similar to those of the federal transfer statute, 28 U.S.C. § 1404(a), and the Multidistrict Litigation Statute, 28 U.S.C. § 1407.").[24] Thus, the SDNY is the desirable forum in which to litigate this class action.

iv. Preclusive Effect of Judgment

Although the factors set forth in Rule 23(b)(3) clearly militate in favor of resolving plaintiffs' liability claims in a single action, defendants argue that a class action proceeding would not be superior because an adverse judgment would not bind class members. *See* Def. Mem. at 13-14. Defendants contend, in particular, that because the Austrian courts will not recognize—let alone accord preclusive effect to—a judgment of this Court, class members will be free to pursue their claims anew in Austria. *See id.* at 14 (citing 6/26/03 Supplemental Declaration of Dr. George Kodek, appointed to Vienna Court of Appeals, Ex. 6 to Def. Mem., ¶¶ 12-15).

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24. There is, however, a difference in which party carries the burden of proof; defendants have the burden of proof in the forum non conveniens context whereas plaintiffs bear the burden in establishing the elements of Rule 23. But the distinction is minimal here because defendants' burden in the forum non conveniens context was reduced. *See Kaprun Siemens AG*, 230 F.Supp.2d at 388 (stating that plaintiffs' choice of forum is entitled to less deference because they have sued in a representative capacity).

[21] It is axiomatic that the purpose of a class action is to resolve finally the claims of all members of a class so that future litigation need not occur. *See, e.g., Donovan v. University of Texas at El Paso*, 643 F.2d 1201, 1206-07 (5th Cir.1981). ("It is undisputed that the purpose of Rule 23 is to prevent piecemeal litigation to avoid: (i) a multiplicity of suits on common claims resulting in inconsistent adjudications; and (ii) the difficulties in determining *res judicata* effects of a judgment"). Thus, as defendants argue, it would be an inefficient use of judicial resources to certify a class in an action that is guaranteed to have no preclusive effect. This is not such an action.

While Austrian courts are not bound by judgments of American courts, there is nothing that prohibits them from recognizing such proceedings. In any event, plaintiffs have ameliorated the potential preclusion problems by conditioning participation in this class action on each class member's agreement to be bound by a final determination on the merits as to liability. Therefore, even if plaintiffs ultimately are disappointed with the result of the United States litigation, they will be precluded from re-litigating their claims against these defendants in Austria or any other jurisdiction. Thus, a verdict of no liability from a United States court will give defendants complete finality.

Although a verdict finding defendants liable will not result in finality (because the foreign defendants may be able to re-litigate this issue in foreign jurisdictions), [25] defendants will be no worse off for having litigated liability in the United States. In the absence of class certification, defendants would still face suit in the United States on the eight Americans' claims, *as well as* in at least three foreign countries. If defendants are found liable in a United States class action, the foreign defendants may still be able to defend themselves in those

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25. A liability verdict against the American defendants will have preclusive effects, presuming plaintiffs bring their damages actions against those defendants in the United States.

countries. But, if defendants prevail on liability, they will have achieved finality by defending in *only* one action. Thus, it is a likely as not that this case *will* fully resolve plaintiffs' claims.

v. "Opt-In" Class

[22] Because participation in the class requires prospective members to take affirmative action—namely, to consent to be bound by the judgment—plaintiffs seek to certify an "opt-in" class, as opposed to the traditional Rule 23(b)(3) "opt-out" class.[26] An "opt-in" is necessary here because it would be unfair to presumptively include members in a class for which membership depends upon the waiver of a right. Indeed, the requirement that class members consent to be bound by the judgment is analogous to a Fair Labor Standards Act ("FLSA") action, which binds only those who affirmatively desire to be class members.[27] Thus, the FLSA requirement that *all* class members "opt-in" is warranted here.[28]

Defendants oppose the creation of an "opt-in" class, arguing that there is no precedent in Rule 23 jurisprudence for such an "unusual" class definition. Def. Mem. at 22. While it is true that this Court has been unable to find a case in which an "opt-in" class was certified under Rule 23, there is nothing in the rule or case law that precludes such certification.[29] On the contrary, a few courts have acknowledged that "opt-in' class

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26. Plaintiffs have not actually articulated why they propose an opt-in class. But this is the only rational explanation.

27. Under section 216(b) of FLSA, a member of the class who is not named in the complaint is not a party unless she affirmatively "opts-in" by filing a written consent-to-join with the court. See 29 U.S.C. §§ 216(b), 256.

28. The opt-in requirement pertains to the American plaintiffs, as well as the foreign plaintiffs, because they too must waive their rights to sue these defendants in any foreign jurisdictions.

29. The Supreme Court has decided only that the Due Process Clause of the Fifth Amendment does not require plaintiffs to affirmatively "Opt-in" to a class, rather than be deemed members of the class if they do not "opt-out". *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (finding that the procedure of sending each class member a descriptive notice with an explanation of the right to "opt-out" satisfies due process.) The Court has not addressed whether "opt-in" classes may be beneficial in certain circumstances.

may be necessary in certain circumstances. *See, e.g., Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1260-61 (5th Cir.1977) (recognizing that there are some class actions where it may be necessary for class members to opt in); *In re Crazy Eddie Sec. Litig., 135* F.R.D. 39, 42 (E.D. N.Y.1991) ("Circumstances may require a court to depart from the spirit of the Federal Rules and impose what amounts to an opt-in requirement.").[30]

[23] The fact that Rule 23 does not explicitly authorize courts to certify "opt-in" classes under Rule 23(b)(3) is immaterial. This Court's authority to certify an opt-in class, where necessary, derives from its equitable powers. After all, the "class suit was an invention of equity." *Hansberry v. Lee*, 311 U.S. 32, 41, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) (acknowledging that the modern class action device developed as an exception to the rigidity of the

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30. Defendants cite a number of cases in which they contend "courts have consistently rejected the notion that Rule 23 permits plaintiffs to create 'opt-in' classes." Def. Mem. at 22. In none of those cases, however, was the issue of the court's authority to certify an "opt-in" class under Rule 23 placed squarely before the court. *See, e.g., H.W. Urban GmbH, D & H v. Republic of Argentina*, No. 02 Civ. 5699, 2033 WL 21058254, at *2 (S.D.N.Y. May 12, 2003) (stating, in dicta: "The court has suggested in the hearings thus far held that it might be desirable to have the class consist of persons who 'opt-in,' if class action treatment is permitted. The plaintiffs . . . oppose this, as contrary to Rule 23, and they are *probably* correct.") (emphasis added). Some courts have merely stated, in passing, that an "opt-in" class is contrary to the purpose of Rule 23(b)(3), without considering whether there could ever be a need for such a class. *See, e.g., Kohne v. IMCO Container Co.*, 480 F.Supp. 1015, 1018 (W.D. Va. 1979).

necessary parties rule in equity, as well as from the bill of peace, an equitable device for combining multiple suits) (citations omitted).[31]

Because I find that a class action is the superior method of adjudicating plaintiffs' liability claims, and class membership requires consent to be bound by the judgment, this action should proceed as an "opt-in" class action. Notice should be given to all potential class members of their right to "opt-in" *Cf. Braunstein v. Eastern Photographic Labs., Inc.*, 600 F.2d 335, 336 (2d Cir.1979) (holding that a district court has the power to order that notice be given to potential members of plaintiff class under opt-in provisions of FLSA).

2. 23(B)(2)

[24-26] Plaintiffs additionally move for certification under Rule 23(b)(2), which authorizes certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R. Civ.P. 23(b)(2). Rule 23(b)(2) certification is improper "in cases in

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31. The necessary parties rule mandated that "all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however, numerous they may be." *West v. Randall*, 29 F. Cas. 718, 721 (No. 17,424) (C.C.D.R.I. 1820). But because the rule sometimes led to an unfair denial of recovery to the party before the court, equity developed exceptions, among them one to cover situations "where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole. . . ." *Id.* at 722. From these roots, modern class action practice emerged in the 1966 revision of Rule 23. In drafting Rule 23(b), the Advisory Committee "sought to catalogue in 'functional' terms 'those recurrent life patterns which call for mass litigation through representative parties.'" *Ortiz*, 527 U.S. at 832, 119 S.Ct. 2295 (quoting Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L.Rev. 497 (1969)).

which the appropriate final relief relates exclusively or predominantly to money damages." *Visa Check*, 280 F.3d at 146 (citing Fed.R. Civ. P. 23(b)(2) Advisory Committee Note); *see also Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2dCir.1968) ("Subsection (b)(2) was never intended to cover cases . . . where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory."), *vacated on other grounds*, 417 U.S. 156, 94 S.Ct. 2140, 40 L. Ed.2d 732 (1974). "However, if money damages are merely incidental to plaintiffs' request for injunctive or declaratory relief, class actions may be certified under Rule 23(b)(2)." *Bolanos v. Norweigian Cruise Lines Ltd.*, 212 F.R.D. 144, 156-157 (S.D.N.Y.2002) (internal quotation marks and citations omitted).

[27-29] When presented with a motion for class certification of a claim seeking both injunctive and non-incidental monetary relief, a district court must "assess whether [Rule 23](b)(2) certification is appropriate in light of the relative importance of the remedies sought, given all of the facts and circumstances of the case." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir.2001) (internal quotation marks and citations omitted). A court may allow certification under Rule 23(b)(2) if it finds that "(1) the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed, and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy." *Id.* (internal quotations marks and citations omitted). "Insignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery." *Id.* (citation omitted).

Here, plaintiffs seek punitive and compensatory damages for wrongful death, pain and suffering, and economic losses, *see* Am. Compl., Prayer for Relief ¶ c, as well as declaratory and injunctive relief to "prevent the immediate and future commercial use" and "advertisement of the train and tunnel, as well as other similar trains and tunnels owned and/or operated by defendants," *id.* ¶¶a, b. It is clear from the Complaint, however, that this case is primarily about compensating plaintiffs for the tragic loss of their loved ones. Although plaintiffs have not yet provided an estimate of the damages they seek, it can be assumed that the amount is not insignificant. The "non-incidental nature" of the damages sought by plaintiffs demonstrates that their damages claims predominate over their claims for declaratory and injunctive relief.[32] *Augustin v. Jablonsky*, No. 99 Civ. 3126, 2001 WL 770839, at *9 (E.D.N.Y. Mar. 8, 2001). Moreover, the injunctive relief that plaintiffs seek—to prevent the operation and advertising of the train and other trains operated by defendants—relates only to a small number of defendants.[33] *See Abramovitz v. Ahern*, 96 F.R.D. 208, 216 (D.Conn.1982) (denying class certification under Rule 23(b)(2) based in part on the fact that such relief "is directed primarily against the [defendant] custodians of certain records, and as such it does not apply to all of the defendants.").

Lastly, because I have found that certification is appropriate under Rule 23(b)(3), there is no benefit to additionally certifying the class under (b)(2). *See Chateau De Ville Prods., Inc. v. Tams-Witmark Music Library, Inc.*, 586 F.2d 962, 966 n. 14 (2dCir.1978) (noting that when a district court certifies a class under both Rule 23(b)(2) and (b)(3), "major problems can arise . . . where different procedural consequences attach

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32. The fact that plaintiffs never sought preliminary injunctive relief is further evidence that injunctive relief is not a priority.

33. For example, defendants who manufactured a part of the Kaprun train have no role in deciding whether the train will continue to operate or advertise.

depending upon the subsection used"); *see also Bolanos*, 212 F.R.D. at 157 n. 11 ("If, as recommended, a Rule 23(b)(3) class is certified here, . . . , it would not be error to certify the class under Rule 23(b)(2) also, but it would add nothing to do so and in fact would complicate matters.") (internal citation omitted). Thus, class certification under 23(b)(2) is denied.

IV. CONCLUSION

For the foregoing reasons, plaintiffs' motion for class certification is conditionally granted if, within thirty days of this Order: (1) there are at least two plaintiffs who are willing and qualified to serve as co-class representatives; (2) the class representatives agree to work with a committee of non-American class members; and (3) class counsel agree to work with Fagan as liaison counsel to the non-American class members.

SO ORDERED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2004

(Argued November 2, 2004 Decided December 20, 2004)

Docket No. 04-0957-cv

RUDOLPH KERN, And on behalf of the Estate of Erich Kern, ANGELA KERN, And on behalf of the Estate of Erich Kern, JOHN S. HABBLETT, LTC (Ret.), and on behalf of the Estates of Jennifer Kirkpatrick Habblett Goodridge, Michael Jonclair Goodridge and Kyle William Goodridge, SUZANNE K. HABBLETT, And on behalf of the Estates of Jennifer Kirkpatrick Habblett Goodridge, Michael Jonclair Goodridge and Kyle William Goodridge, DICK BAKER, Dr., And on behalf of the Estate of Carrie Lynn Baker, CAROL BAKER, DR., and on behalf of the Estate of Carrie Lynn Baker, CLAIRE GOODRIDGE, Individually as surviving father and as personal representative of the estate of Maj. Michael Clair Goodridge, deceased and individually as surviving grandfather and as personal representative of the estates of Michael Jonclair Goodridge, deceased and Kyle William Goodridge, deceased for himself and on behalf of decedents' estates, the distributes thereof and on behalf of decedents' surviving next of kin, including Julianne V. Goodridge, the surviving mother of Maj. Michael Clair Goodridge and surviving grandmother of Michael Jonclair Goodridge and Kyle William Goodridge,

Plaintiffs-Appellees,

—v.—

SIEMENS CORPORATION, SIEMENS AG, WAAGNER-BIRO BINDER AG IN ABWICKLUNG, WAAGNER-BIRO BINDER BETEILIGUNGS AG, WB HOLDING AG, BINDER AND CO AG, BOSCH REXROTH AG, BOSCH REXROTH CORPORATION, AND OMNIGLOW CORPORATION,

Defendants-Appellants,

LEITNER LIFTS USA INC., LEITNER S.P.A., OSTERREICHISCHE ELEKTRIZITATSWIRTSCHAFTS AG, SWOBODA KAROSERIE AG, BAUBERDARFSZENTRUM STADLBAUER AG, GLETSCHERBAHNEN KAPRUN AG, ABC CORPORATIONS 1-10, JOHN DOES 1-10, SWOBODA KAROSERIE-UND, STAHLBAU GMBH, TAUREN TOURISTIK, GMBH, THYSSEN SCHACHTBAU, GMBH, THYSSENKRUPP AG, INTERSPORT AUSTRIA GMBH, INTERSPORT INTERNATIONAL CORP., INTERSPORT MARKETING USA, HEITKAMP, INC., GLETSCHERBAHNEN KAPRUN AKTIENGESELLSCHAFT,

Defendants.

Before:

CARDAMONE, CABRANES, and SOTOMAYOR

Circuit Judges.

Interlocutory appeal from an order entered by the United States District Court for the Southern District of New York (Shira A. Scheindlin, *Judge*), certifying, pursuant to Federal Rule of Civil Procedure 23(b)(3), a so-called "opt in" class of heirs, beneficiaries, and personal representatives of individuals who died in the Ski Train Fire at Kaprun, Austria on November 11, 2003.

Reversed and remanded with instructions to enter an order denying plaintiffs' motion for class certification.

ROBERT A. SWIFT, Kohn, Swift & Graf, Philadelphia, PA (Jay J. Rice, Diane E. Sammons, Randee M. Matloff, Nagel, Rice & Mazie, LLP, Livingston, NJ; Martin J. D'Urso, Hilary E. Cohen, Kohn, Swift & Graf, Philadelphia, PA; Kenneth P. Nolan, Christina M. Fry, Speiser, Krause, Nolan & Granito, New York, NY, *of counsel*), *for Plaintiffs-Appellees.*

CHRISTOPHER LANDAU (Thomas D. Yannucci, P.C., Brant W. Bishop, Susan Engel, *of counsel*), Kirkland & Ellis LLP, Washington, DC, *for Defendants-Appellants Siemens Corporation and Siemens AG.*

Frederick W. Reif, Debra Tama, Riker Danzig Scherer Hyland & Perretti LLP, New York, NY, *for Defendants-Appellants Waagner-Biro Binder AG in Abwicklung, Waagner-Biro Binder Beteiligungs AG, WB Holding AG, Binder and Co AG.*

Arthur J. Liederman, Dylan C. Braverman, Morrison, Mahoney & Miller, LLP, New York, NY, *for Defendant-Appellant Bosch Rexroth AG.*

Arnd N. von Waldow, Reed Smith, LLP, Pittsburgh, PA; Paul P. Rooney, Reed Smith, LLP, New York, NY, *for Defendant-Appellant Bosch Rexroth Corporation.*

E. Gordon Haesloop, Bartlett, McDonough, Bastone & Monaghan, LLP, Mineola, NY, *for Defendant-Appellant Omniglow Corporation.*

JOSÉ A. CABRANES, *Circuit Judge*:

Defendants Siemens Corporation, Siemens AG, Waagner-Biro Binder AG in Abwicklung, Waagner-Biro Binder Beteiligungs AG, WB Holding AG, Binder and Co AG, Bosch Rexroth AG, Bosch Rexroth Corporation, and Omniglow Corporation (collectively, "defendants") appeal from the order of the United States District Court for the Southern District of New York (Shira A. Scheindlin, *Judge*), dated November 12, 2003, granting plaintiffs' motion for class certification. *See In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, No. MDL 1428 (S.D.N.Y. Nov. 12, 2003). The District Court certified the class, pursuant to Fed. R. Civ. P. 23(b)(3) "for liability purposes only," as "limited to the claims of heirs, beneficiaries and personal representatives of individuals who died in the Ski Train Fire at Kaprun[,] Austria on November 11, 2000." *Id.* To join this class, the District Court's order further required that prospective members "opt in" by affirmatively consenting to inclusion. *See In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 220 F.R.D. 195, 199, 209-11 (S.D.N.Y. 2003). Defendants argue, *inter alia*, that the District Court overstepped the bounds of Rule 23 by certifying an "opt in" class. We agree and therefore reverse the order of the District Court.

BACKGROUND

The history of this case is reported in the opinion and order of the District Court, and we recount below only those facts relevant to the disposition of this appeal. *See In re Ski Train Fire, 220 F.R.D. 195.* On November 11, 2000, a funicular[1] train caught fire inside a tunnel near Kaprun, Austria; 155 passengers and crew members died in the inferno. Among the victims were ninety-two Austrians, thirty-seven Germans, ten Japanese, eight Americans, four Slovenians, two Dutchmen, a Briton, and a Czech. Plaintiffs, family members of the American victims, filed various lawsuits related to the Kaprun tragedy in several American courts. The Judicial Panel on Multidistrict Litigation transferred these cases to the United States District Court for the Southern District of New York "for coordinated or consolidated pretrial proceedings." *See In re Ski Train Fire in Kaprun, Austria on November 11, 2000,* 175 F. Supp. 2d 1379, 1380 (J.P.M.L. 2001).

In their amended complaint before the District Court, plaintiffs sought damages, as well as declaratory and injunctive relief, from various entities, alleging that the train and tunnel were improperly designed, constructed, and maintained, as well as negligently operated and promoted. Plaintiffs also alleged, *inter alia*, that certain defendants fraudulently misrepresented the safety of the train and the tunnel and intentionally inflicted emotional distress. Most significantly for the purposes of this appeal, plaintiffs brought their claims "on their own behalf, and on behalf of a class of heirs and representatives of victims" of the Kaprun tragedy "who consent in being included as members of the class." If certified, the

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1. A funicular railway is a cable railway ascending a mountain, typically by partly or wholly counterbalancing the weight of the ascending car by the weight of the descending car. *See Merriam-Webster's Third New International Dictionary Unabridged* (1976), *available at* http://mwu.eb.com/mwu. According to one writer in *The New York Times*, the "definitive" online source for information about funicular transportation is the magazine *Funimag*, which one can find at http://www.funimag.com. Joyce Cohen, *Glory Days of the Incline, Before the Decline*, N.Y. Times, Mar. 23, 2000, at G8.

plaintiffs' class would consequently include the heirs and beneficiaries of foreign victims. Plaintiffs asked the District Court to certify this class pursuant to Rule 23(b)(2) and 23(b)(3).[2]

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2. Fed. R. Civ. P. 23 provides, in part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

In an amended order dated October 14, 2003, the District Court certified plaintiffs' class pursuant to Fed. R. Civ. P. 23(b)(3),[3] to resolve "liability issues only," rather than damages. *In re Ski Train Fire*, 220 F.R.D. at 199. The class would consist of "all heirs, beneficiaries and personal representatives of all individuals who died in the fire who consent to inclusion." *Id.* (internal quotation marks and emphasis omitted). "Because participation in the class requires prospective members to take affirmative action" by first consenting "to be bound by the judgment," the District Courtcertified "an 'opt-in' class, as opposed to the traditional Rule 23(b)(3) 'opt-out' class." *Id.* at 209, 211. Defendants[4] now appeal the District Court's certification decision.

Defendants challenge the District Court's decision on four grounds. First, they argue that Rule 23 does not permit certification of a class with an "opt in" provision. Second, they argue that a class of "all heirs, beneficiaries and personal representatives" is unmanageable because identifying class members would require an individualized inquiry into each decedent's estate. Third, defendants challenge the suitability of the class action mechanism for resolving issues of legal liability in an accident with mass fatalities. Finally, defendants argue that the District Court erred by certifying a class to pursue claims of fraud and intentional infliction of emotional distress, since such claims may require individual determinations.

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3. The District Court denied class certification pursuant to Rule 23(b)(2). *See In re Ski Train Fire*, 220 F.R.D. at 211-12.

4. On October 8, 2004, the District Court dismissed four of the defendants from the underlying action for lack of personal jurisdiction, leaving only Siemens AG, Siemens Corporation, Bosch Rexroth Aktiengesellschaft, Bosch Rexroth Corporation, and Omniglow Corporation. *See In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, No. 03 Civ. 6351, 2004 U.S. Dist. LEXIS 20182 (S.D.N.Y. Oct. 8, 2004).

DISCUSSION

I. Standard of Review

We review a district court's decision to certify a class for abuse of discretion. *See, e.g., Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 18 (2d Cir. 2003). "A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001) (internal citations omitted).

II. An "Opt in" Class

We first consider whether the District Court erred by certifying what it described as an "opt in" class. Rule 23(c) contains a so-called "opt out" requirement, mandating that members of a class certified under Rule 23(b)(3) be afforded an opportunity to "request exclusion" from that class.[5] The language of Rule 23 does not, however, require members of any class affirmatively to opt into membership. Nor is such an "opt in" provision required by due process considerations. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("We reject [the] contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively 'opt in' to the class, rather than be deemed members of the class if they do not 'opt out.' ").

Not only is an "opt in" provision not required, but substantial legal authority supports the view that by adding the "opt out" requirement to Rule 23 in the 1966 amendments, Congress *prohibited* "opt in" provisions by implication. Professor Benjamin Kaplan of Harvard Law School, who

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5. Rule 23(c)(2)(B) provides, in relevant part, that notice to members of "any class certified under Rule 23(b)(3) . . . must concisely and clearly state in plain, easily understood language . . . that the court will exclude from the class any member who requests exclusion . . . ."

served as Reporter of the Advisory Committee on Civil Rules from 1960 to 1966, and later as a Justice of the Supreme Judicial Court of Massachusetts, explained that the Committee rejected the suggestion "that the judgment in a (b)(3) class action, instead of covering by its terms all class members who do not opt out, should embrace only those individuals who in response to notice affirmatively signify their desire to be included . . . ." Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 397 (1967). He elaborated the rationale of the Committee's decision:

> [R]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable. For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government. In the circumstances delineated in subdivision (b)(3), it seems fair for the silent to be considered as part of the class. Otherwise the (b)(3) type would become a class action which was not that at all—a prime point of discontent with [the pre-1966 version of Rule 23].

Id. at 397-98, *cited with approval in Shutts*, 472 U.S. at 813 n.4. Courts have generally echoed Justice Kaplan's view that "opt in" provisions are contrary to Rule 23. *See Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340 (7th Cir. 1974) ("[T]he requirement of an affirmative request for inclusion in the class is contrary to the express language of Rule 23(c)(2)(B) . . . ."); *Enter. Wall Paper Mfg. Co. v. Bodman*, 85 F.R.D. 325, 327 (S.D.N.Y. 1980) ("Rule 23(c)(2)(B) calls for a notice that enables prospective members to opt-out, in language strongly suggesting the impropriety of opt-in requirements (i.e. 'the judgment, whether favorable or not, will include all members

who do not request exclusion'). This reading of the rule has been accepted by most courts essentially for the reasons stated by Justice Kaplan. . . .").[6]

Admittedly, we have never squarely held that Rule 23 prohibits certification of an "opt in" class. This is unsurprising since it appears, as the District Court concedes, 220 F.R.D. at 210, no other federal court has explicitly certified an "opt in" class. It is more common that courts have considered whether mandatory class-member questionnaires are permissible during the discovery stage of a class action. Some courts have held that such questionnaires are impermissible—precisely because they may constitute a *de facto* "opt in" provision. *See Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986) ("Used in a Rule 23(b)(2) setting, a discovery order threatening dismissal for non-compliance amounts to no more

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6 Eminent authorities on the Rules agree. *See* 5 James Win. Moore, et al., *Moore's Federal Practice* § 23.104[2][a][ii] (3d ed. 2004) ("There is no authority for establishing 'opt-in' classes in which the class members must take action to be included in the class. Indeed, courts that have considered 'opt-in' procedures have rejected them as contrary to Rule 23."); 2-14A James Win. Moore, et al., *Moore's Manual-Federal Practice and Procedure* § 14A.23[5][f] (2004) ("Federal class action procedures do not provide for 'opt-in' classes in which the class members need to take action to be included in the class. Therefore, a class member may do nothing and rely on the class counsel and class representative to conduct the action, in which case the class member is bound by the judgment.") (internal citations omitted); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1787, at 214 (2d ed. 1986) ("The ability of a member to secure the benefits of a successful termination of the action without affirmatively pressing his own claim is particularly important because it assures that small claimants who would be unable to protect their rights through separate suits can take advantage of the judgment in the class action without the burden of actually participating. It was for this reason that the Advisory Committee specifically rejected the notion of requiring absent class members to opt-into the action to secure its benefits.") (internal citations omitted); *id.* at 216 (stating that "bar[ring] the claims of the passive members unless within a reasonable period they file a brief statement of their intent to prove damages" would have "the effect of obliging absent class members to opt-in, [which] is directly contrary to the philosophy of Rule 23(c)(2)") (internal citations and quotation marks omitted).

than an affirmative 'opt-in' device-that is, it requires passive class members to take positive action to stay in the suit."); *McCarthy v. Paine Webber Group, Inc.*, 164 F.R.D. 309, 313 (D. Conn. 1995) ("Dismissal of an absent class member's claims as sanctions for failure to answer a questionnaire is contrary to the opt-out policy of Rule 23."). Likewise, courts have hesitated to require class members to file proofs of claim before a liability determination because such a provision resembles an "opt in" procedure. *See Enter. Wall Paper*, 85 F.R.D. at 327; *Abulaban v. R. W. Pressprich & Co.*, 51 F.R.D. 496, 497 (S.D.N.Y. 1971) ("Failure to file any document in the nature of an inclusionary request should not, in the initial stages of the litigation, preclude a person from being considered a member of the class."); *see also* 2-14A James Win. Moore, et al., *Moore's Manual—Federal Practice and Procedure* § 14A.23[5][b] (2004) ("[A] court may generally not require class members to file a proof of claim form before a liability determination, because courts have generally found the use of such a form to be an improper opt-in requirement in violation of Rule 23(c)(2), at least as a prerequisite to trial."); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1787, at 216 (2d ed. 1986) (noting that "some courts have refused to authorize the use of a proof-of-claim form" because such a form may constitute an "opt in" provision) (internal citation omitted). In short, we find scant support for the proposition that a court could *ever* certify a class with an "opt in" provision during the liability stage of the litigation.

Despite substantial authority indicating that Rule 23 precludes certification of "opt in" classes, the District Court relied on a handful of cases to announce a new rule of civil procedure, namely that "opt in" classes are not only permissible, but may in fact "be necessary in certain circumstances." *In re Ski Train Fire, 220 F.R.D. at 210* (citing *Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1260-61 (5th Cir. 1977), and *In re Crazy Eddie Sec. Litig.*, 135 F.R.D. 39, 42 (E.D.N.Y. 1991)). The District Court reasoned that an "opt in" class is "necessary" in this case because plaintiffs sought to certify a class whose prospective members are defined by their willingness

"to take [the] affirmative action" of "consent[ing] to be bound by the judgment." *Id.* at 209. The District Court elaborated that "[a]n 'opt-in' class is necessary here because it would be unfair to presumptively include members in a class for which membership depends on a waiver of a right." *Id.* at 209-10. Acknowledging the novelty of certifying an "opt in" class under Rule 23, the District Court also indicated that its authority to do so could be derived from other sources. One such source was an analogy to the Fair Labor Standards Act (FLSA), which provides for judgments that "bind[ ] only those who affirmatively desire to be class members." *Id.* at 210. Another asserted source was the District Court's "equitable powers." *Id.*

The District Court's certification of an "opt in" class in this case was error. *Zervos*, 252 F.3d at 169 (noting that legal error is a species of "abuse of discretion"). First, the two cases on which the District Court relied hardly provide clear guidance on the issue. The only support to be found for the District Court's application of *Robinson* is a single sentence—and then only if taken out of context. The Court of Appeals for the Fifth Circuit stated that "there are some class actions where it is necessary for class members who do not opt out to take some affirmative action as a condition of ultimate recovery," 544 F.2d at 1260 (internal quotation marks omitted), but then immediately continued: "The key word here is 'ultimate.' . . . Although there may be some . . . actions in which unnamed individual plaintiffs will have to come forward to establish their entitlement to portions of the recovery, such requirement should not be imposed upon them until *necessary* for adjudication. . . . Opting in was not necessary *before the determination of liability.*" *Id.* at 1260-61 (emphasis added). In other words, in relying on *Robinson*, the District Court ignored the critical difference between, on the one hand, requiring an individual to take affirmative action to join a class for liability determination purposes and, on the other hand, requiring a class member to take action (such as filling out a claim form)

in order to obtain the ultimate relief.[7] The former is an "opt in" provision and the latter is not, since a class member who fails to obtain ultimate relief because she did not fill out a claim form is nonetheless still a class member. Judge Wisdom's concurring opinion in *Robinson* explained this distinction: "The supplemental notice in this case does not violate the amendment to Rule 23(c)(2) because it does not require members to opt-into the class action in order to be bound by it. . . . The supplemental notice, directed only to those members who had not excluded themselves, merely conditioned the receipt of individualized non-injunctive relief on the submission and proof of the claim for such relief." *Id.* at 1262 (Wisdom, J., concurring); *cf.* 7B Wright, Miller & Kane § 1787, at 217 (recognizing that class "members should not be barred from asserting their rights simply because they failed to demonstrate at the outset of the action that their claims had some validity," even though, "once defendant's liability is established, the court may be justified in . . . requiring class members to file statements of their claims and barring those not presented at that time").

Crazy Eddie is likewise unavailing. In that case, a district court denied a request to send an information statement to putative class members, citing sources that counsel *against* certifying "opt in" classes. 135 F.R.D. at 42. Then, in a brief unsupported comment, the court added: "Circumstances may require a court to depart from the spirit of the Federal Rules and impose what amounts to an opt in requirement. Those special circumstances are not present in this case." *Id.* The *Crazy Eddie* court offered no guidance, however, on circumstances when "opt in" classes may prove appropriate. It can

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7. Plaintiffs fall into the same trap in this appeal. They principally rely on cases-for example, *Kyriazi v. Western Electric Co.*, 647 F.2d 388 (3d Cir. 1981)-where courts required class members to take affirmative action to obtain ultimate relief. See id. at 392 ("The proof of claim procedure employed by the district court was not novel. The consensus among courts and commentators is that such an inquiry *after a judgment establishing liability* is not prejudicial and can serve as an essential aid in the efficient control of a complex class action suit.") (emphasis added). By contrast, in the instant case, the District Court would require absent plaintiffs to take affirmative action in order to join a class formed "with respect to liability issues only." *In re Ski Train Fire*, 220 F.R.D. at 199 (emphasis omitted).

thus hardly sustain the weight of the District Court' s unprecedented legal conclusions here.

Second, even assuming for the argument that Rule 23 permits courts to certify "opt in" classes when "certain circumstances" prove them "necessary," *In re Ski Train Fire*, 220 F.R.D. at 210, the District Court clearly erred in defining such circumstances. According to the Court, the "opt in" provision was rendered necessary in this case by plaintiffs' decision to define class membership by reference to affirmative conduct—their affirmative "consent to being included." The "opt in" provision was not, therefore, necessary in any objective sense; rather, it was necessary only because plaintiffs defined it into necessity. The District Court's approach would thus authorize "opt in" classes well beyond the narrow confines of current Rule 23 jurisprudence by rubber-stamping plaintiffs' "opt in" requests.

On appeal, plaintiffs suggest three additional reasons why an "opt in" class "was appropriate in this action." Appellees' Br. at 14. "First, non-American Class members must accept the risk that, if they are required to litigate damages in their own countries [and if these foreign courts decline to recognize the liability judgment of American courts], an American judgment may only be *evidence* of a Defendant's liability." *Id.* This argument has essentially the same flaw as the District Court's argument—the purported necessity of the "opt in" provision is a function not of the circumstances of this case, but of the particular litigation strategy that plaintiffs chose to pursue. "Second, the opt-in procedure avoided any question as to whether Class members received adequate notice—another issue likely to arise in international class actions"; and "[t]hird, the opt-in procedure assured that absent Class members desired to be represented by Class Counsel—a concern that often arises in the context of serious personal injury claims." *Id.* Whatever the merits of these two arguments, they would expand the use of "opt in" provisions far wider than the present Rule 23 jurisprudence conceivably contemplates. After all, adequate notice and satisfactory class representation are salient issues in most class actions.

In short, we cannot envisage any circumstances when Rule 23 would authorize an "opt in" class in the liability stage

of a litigation. But even if circumstances necessitating the certification of such a class could be shown, neither the District Court nor plaintiffs have done so in the case before us.

Nor does the District Court's analogy to the FLSA provide support for this novel reconstruction of Rule 23. The Court is correct that, unlike Rule 23, the FLSA provides that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b); *see also De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 306 (3d Cir. 2003) ("The principal difference between FLSA class actions and Fed. R. Civ. P. 23 class actions is that prospective plaintiffs under the FLSA must consent to join the class."). The District Court, however, was asked to certify a class under Rule 23, not under the FLSA. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n.12 (11th Cir. 1996) ("[I]t is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class action under Rule 23 of the Federal Rules of Civil Procedure."). If anything, the language of the FLSA suggests that, should Congress seek to authorize certification of "opt in" classes, it can do so with unambiguous language. All parties concede that Rule 23 contains no such language.

Lastly, the District Court erroneously invoked its "equitable powers." That Rule 23 does not authorize "opt in" classes is "immaterial," the Court held, because courts have "equitable powers" to certify such classes. *In re Ski Train Fire*, 220 F.R.D. at 210. Contrary to the District Court's assertion, Rule 23 offers the *exclusive* route to forming a class action. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("[O]f overriding importance, courts must be mindful that [Rule 23] as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers . . . . The text of a rule thus proposed and reviewed limits judicial inventiveness."); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (stating that "a trial court must conduct a 'rigorous analysis' to ensure that the prerequisites of Rule 23 have been satisfied before certifying a class"). Any

putative "opt in" class, assuming such classes are permitted at all, must still satisfy the requirements of Rule 23. Plaintiffs have not demonstrated that the facts of this case permit the certification of an "opt in" class that comports with Rule 23.

We therefore hold that the District Court erred in granting plaintiffs' request to certify a class with an "opt in" provision. Since plaintiffs' amended complaint defined prospective members by reference to their affirmative consent to inclusion in the class—and since the District Court concluded that the "opt in" feature is "necessary" to effectuate plaintiffs' class certification request, *In re Ski Train Fire*, 220 F.R.D. at 209-10—we remand the cause to the District Court with instructions to enter an order denying class certification.[8] Accordingly, we need not reach defendants' other arguments purporting to show why class certification was inappropriate in this case.

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8. We also have significant doubts whether without the "opt in" provision—or perhaps even with that provision—plaintiffs' class is "superior to other available methods for the fair and efficient adjudication of the controversy," as Rule 23(b)(3) would require it to be. The District Court observed that "non-American plaintiffs will be unable to bring their damages actions against the foreign defendants in the United States because there is no diversity jurisdiction over a foreign plaintiff suing a foreign defendant in the United States." *In re Ski Train Fire*, 220 F.R.D. at 207 n.19. Austrian courts, where such damages actions would likely be resolved, are, however, "not bound by judgments of American courts." *Id.* at 209. In light of these conclusions, defendants understandably argued that a class action in American courts on behalf of foreign victims would be merely advisory and therefore not superior to other methods of adjudication. The District Court declined to credit this concern, arguing that

> plaintiffs have ameliorated the potential preclusion problems by conditioning participation in this class action on each class member's agreement to be bound by a final determination on the merits as to liability. Therefore, even if plaintiffs ultimately are disappointed with the result of the United States litigation, they will be precluded from re-litigating their claims against these defendants in Austria or any other jurisdiction. Thus, a verdict of no liability from a United States court will give defendants complete finality.

Id. at 209. Thus, the District Court relied, at least in part, on the "opt in" provision of the plaintiffs' class when it certified that class under Rule 23(b)(3). Since we now hold that the "opt in" provision here violated Rule 23, we need not decide whether the District Court correctly found that the provision resolved concerns about the asserted inefficiency of the proposed class.

CONCLUSION

For the reasons stated above, we hold that the District Court erred by certifying an "opt in" class pursuant to Rule 23(b)(3). The judgment of the District Court is therefore reversed, and the cause is remanded to the District Court with instructions to enter an order denying plaintiffs' motion for class certification.

(2)

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No. 04-1294

IN THE

Supreme Court of the United States

RUDOLF KERN AND
JOHN S. HABBLETT, LTC (RET.) *ET AL.*,

Petitioners,

v.

SIEMENS CORPORATION *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

COUNTERSTATEMENT OF THE CASE 2

A. Factual Background 2

B. Proceedings Below 2

REASON FOR DENYING THE WRIT 4

The Second Circuit Correctly Held That The District Court Erred By Certifying An "Opt In" Class, And The "Conflict" Alleged By Petitioners Is Illusory. 4

CONCLUSION 9

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state as follows:

Respondent Siemens AG has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Respondent Siemens Corporation is a wholly owned indirect subsidiary of respondent Siemens AG, and no other publicly held corporation owns 10% or more of its stock.

Respondent Bosch Rexroth AG is a wholly-owned subsidiary of Robert Bosch GmbH, and no other publicly held corporation owns 10% or more of its stock.

Respondent Bosch Rexroth Corporation is a wholly owned subsidiary of Robert Bosch Corporation, and no publicly held corporation owns 10% or more of its stock.

Respondent Omniglow Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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521 U.S. 591 (1997) 5, 6
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517 U.S. 416 (1996) 6
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85 F.R.D. 325 (S.D.N.Y. 1980) 7
Green v. Wolf Corp.,
406 F.2d 291 (2d Cir. 1968) 6
In re General Motors Corp. Engine Interchange Litig.,
594 F.2d 1106 (7th Cir. 1979) 6
In re Ski Train Fire in Kaprun, Austria on November 11, 2000,
175 F. Supp. 2d 1379 (J.P.M.L. 2001) 2, 3
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281 F. Supp. 391 (S.D. Iowa 1968) 7
Kyriazi v. Western Elec. Co.,
647 F.2d 388 (3d Cir. 1981) 7
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Snell v. Allianz Life Ins. Co.,
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aff'd mem., 2002 WL 31059209 (3d Cir. Sept. 16, 2002). 7

STATUTES AND RULES

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Fed. R. Civ. P. 23(a) 5
Fed. R. Civ. P. 23(b) 5

Fed. R. Civ. P. 23(b)(1) 5
Fed. R. Civ. P. 23(b)(2) 5
Fed. R. Civ. P. 23(b)(3) 1, 2, 3, 4, 5, 6, 8
Fed. R. Civ. P. 23(c)(2) 4, 7
Fed. R. Civ. P. 23(c)(2)(B) 4, 6
Fed. R. Civ. P. 23(c)(3) 4
Fed. R. Civ. P. 23(d) 5
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INTRODUCTION

It is elementary that Rule 23(b)(3) of the Federal Rules of Civil Procedure authorizes the certification of so-called "opt out" classes, where absent class members must be given the option of opting *out* of a class. The district court here turned that provision upside down by certifying a Rule 23(b)(3) "opt in" class, where absent class members were required affirmatively to opt *into* the class. The district court freely acknowledged that its approach was both unprecedented and unauthorized by the Rule. Nonetheless, the court declared that the Rule's requirements were "immaterial," and proceeded to certify an "opt in" Rule 23(b)(3) class under its general "equitable powers." Pet. App. 23-24a. Not surprisingly, a unanimous panel of the Second Circuit reversed, holding (per Judge Cabranes) that a district court's equitable powers in this area are bounded by Rule 23, and hence the class certification decision in this case was erroneous, because Rule 23(b)(3) does not authorize "opt in" classes.

Petitioners now ask this Court to reverse the Second Circuit's decision. Curiously, however, petitioners never even address the Second Circuit's reasoning. Rather, petitioners simply insist that "Rule 23 contains no prohibition of opt-in classes," and that "[d]ecisions by other courts support this position and are inconsistent with the Second Circuit's decision." Pet. 7. As the Second Circuit pointed out, however, Rule 23 does not authorize "opt in" classes, and no court until this case had ever purported to certify such a class. In particular, the allegedly "inconsistent" decisions on which petitioners rely are readily distinguishable, because they do not present the question whether a court can certify an "opt in" class at all, but the very different question whether a court that has certified an opt-out class under Rule 23 can nonetheless require class members to submit a claim form to recover damages. In any event, the Second Circuit emphasized that even if Rule 23 could be read

to authorize "opt in" classes in appropriate cases, this simply is not such a case.

Because petitioners fail to identify anything in Rule 23(b)(3) authorizing courts to certify "opt in" classes, or any federal appellate decision construing that provision to convey such authority, or any reason why such certification would be appropriate here in any event, this Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

This case arises out of what plaintiffs themselves have called "the worst tragedy in post-World War II Austrian history." In November 2000, a funicular train carrying skiers up a mountain in the Alpine village of Kaprun, Austria, caught fire in a tunnel and 155 people perished. The victims were primarily Austrian nationals (92), but also included 37 Germans, ten Japanese, eight Americans, four Slovenians, two Dutch, one Briton, and one Czech. The Austrian authorities immediately launched a thorough criminal investigation, and concluded that the fire had been caused by a defective space heater that had been improperly placed in the driver's cab, where it overheated and in turn ignited a hydraulic fluid line.

B. Proceedings Below

Within months of the accident, plaintiffs began filing numerous lawsuits in the United States (originally as individual actions and subsequently amended to be putative class actions) against more than a dozen defendants (primarily Austrian companies and their European and American corporate affiliates) allegedly connected to Kaprun and the train. On plaintiffs' motion, the cases were referred to the Judicial Panel on Multidistrict Litigation, which entered a consolidation order. *See In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 175 F. Supp. 2d 1379 (J.P.M.L. 2001).

That order transferred the cases to the Southern District of New York for coordinated pretrial proceedings. *See id.* at 1379-80.

After the transfer, plaintiffs filed a single Consolidated and Amended Complaint, and moved for class certification. In October 2003, the district court (Scheindlin, J.) entered an order conditionally certifying under Fed. R. Civ. P. 23(b)(3) a class of "all heirs, beneficiaries and personal representatives of all individuals who died in the fire *who consent to inclusion*." Pet. App. 1a (emphasis added; internal quotations and brackets omitted). The court acknowledged that "Rule 23 does not explicitly authorize courts to certify 'opt-in' classes under Rule 23(b)(3)," and that "this Court has been unable to find a case in which an 'opt-in' class was certified under Rule 23." Pet. App. 22-23a. Nonetheless, the court asserted that "[t]his Court's authority to certify an opt-in class, where necessary, derives from its equitable powers." Pet. App. 23a. And an "opt in" class was "necessary" here, the court declared, "[b]ecause participation in the class requires prospective members to take affirmative action—namely, to consent to be bound by the judgment," and "it would be unfair to presumptively include members in a class for which membership depends upon the waiver of a right." Pet. App. 22a. The district court entered a final class certification order in November 2003. *See* C.A. App. 400-01.

Defendants successfully sought interlocutory review of that order under Rule 23(f). After full briefing and oral argument, a unanimous Second Circuit panel reversed the class certification order. *See* Pet. App. 29-44a. As the Second Circuit explained, "the District Court overstepped the bounds of Rule 23 by certifying an 'opt in' class." Pet. App. 31a. In particular, nothing in the language of the Rule, and no case applying the Rule, supported the district court's attempt to transform the "opt out" mechanism of Rule 23(b)(3) into an "opt in" mechanism. Pet. App. 35-42a. Moreover, "even if

circumstances necessitating the certification" of an "opt in" class could *ever* be shown, "neither the District Court nor [petitioners] have done so in the case before us." Pet. App. 42a.

Petitioners did not pursue rehearing in the Second Circuit, but now seek a writ of *certiorari* from this Court.

REASON FOR DENYING THE WRIT

The Second Circuit Correctly Held That The District Court Erred By Certifying An "Opt In" Class, And The "Conflict" Alleged By Petitioners Is Illusory.

The petition should be denied because the Second Circuit correctly held that the district court erred by certifying an "opt in" class, and the "conflict" alleged by petitioners is illusory. As the Second Circuit recognized, nothing in Rule 23 authorizes certification of an "opt in" class, and no court prior to this case had ever certified such a class.

Petitioners insist, however, that "the Second Circuit decision is contrary to the text of Rule 23." Pet. 6 (capitalization modified). Petitioners are wrong. Rule 23 expressly provides (in a provision tellingly omitted from the petition):

> The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, *and who have not requested exclusion*, and whom the court finds to be members of the class.

Fed. R. Civ. P. 23(c)(3) (emphasis added); *see also* Fed. R. Civ. P. 23(c)(2)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including … that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded."). These provisions make it clear that Rule 23(b)(3) is an *opt out*

provision. As the Second Circuit (and indeed even the district court) recognized, nothing in Rule 23 authorizes certification of *opt in* classes. *See* Pet. App. 35-38a & nn.5, 6; Pet. App. 23a.

Petitioners challenge that conclusion by relying on Rule 23(d). That provision, petitioners note, "gives a court discretion to design class notice 'for the fair conduct of the action' and to permit class members to 'intervene' or 'come into the action.'" Pet. 6 (quoting Fed. R. Civ. P. 23(d)). But Rule 23(d) on its face governs "the *conduct* of actions to which this rule applies," Fed. R. Civ. P. 23(d) (emphasis added), not the standards for certifying a class in the first instance. If a putative class does not satisfy the certification requirements of subsections (a) and (b) of Rule 23, nothing in subsection (d) can save it. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) ("In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)."). Rule 23(d), in other words, *presupposes* that a proper class has been certified under Rule 23(a) and (b), and does not alter or expand the standards for class certification.

Petitioners (like the district court) thus frame the issue precisely backwards by insisting that "Rule 23 contains no *prohibition* of opt-in classes." Pet. 7 (emphasis added); *see also* Pet. App. 22a ("[T]here is nothing in the rule or case law that *precludes* ["opt in"] certification.") (emphasis added). The key issue here is not whether Rule 23 *prohibits* opt-in classes, but whether the Rule *authorizes* such classes in the first place. Contrary to the district court's assertion, the absence of such authorization is not "immaterial," Pet. App. 23a; it is dispositive. Courts do not have free-floating equitable authority to certify classes outside the comprehensive framework of Rule 23. *See, e.g., Amchem*, 521 U.S. at 620 ("[O]f overriding importance, courts must be mindful that the Rule ... sets the requirements that they are bound to enforce. Federal Rules take

effect after an extensive deliberative process involving many reviewers.... The text of [the Rule] ... limits judicial inventiveness."); *cf. Carlisle v. United States*, 517 U.S. 416, 425 (1996) ("Whatever the scope of th[e] 'inherent power,' ... it does not include the power to develop rules that circumvent or conflict with the Federal Rules of [Civil] Procedure.").

Indeed, Rule 23 was amended in 1966 precisely to eliminate "opt in" (or "spurious") class actions. *See, e.g., In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1134-35 (7th Cir. 1979) ("Rule 23 was amended to eliminate the spurious class action."). Before then, the Rule allowed certification of a class binding only on those members who opted in. Such spurious class actions, however, "failed to fulfill one of the principal reasons for the existence of class suits—to improve judicial efficiency by reducing the number of suits that might arise from a single wrong to many individuals." *Green v. Wolf Corp.*, 406 F.2d 291, 297-98 (2d Cir. 1968). Thus, "one of the important changes introduced by the present Rule 23 was to make the judgment in a class action binding upon all members of the class, whether they appear in the action or not, unless a member affirmatively 'opts out' of the litigation at the onset." *Id.* at 298 (citing Fed. R. Civ. P. 23(c)(2)(B)). Indeed, the advisory committee that drafted the Rule expressly rejected the "suggest[ion] that the judgment in a (b)(3) class action, instead of covering by its terms all class members who do not opt out, should embrace only those individuals who in response to notice affirmatively signify their desire to be included." Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 397 (1967).

Because (as this Court has explained) "Rule 23(b)(3) 'opt-out' class actions superseded the former 'spurious' class action," *Amchem*, 521 U.S. at 615, it is not surprising that—until the decision below—no court had ever certified an "opt

in" class under Rule 23. Petitioners insist, however, that "[d]ecisions by other courts support [certification of "opt in" classes] and are inconsistent with the Second Circuit's decision." Pet. 7-9 (citing *Snell v. Allianz Life Ins. Co.*, 327 F.3d 665, 669-70 (8th Cir. 2003); *Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 394 (3d Cir. 1981); *Robinson v. Union Carbide Corp.*, 544 F.2d 1257, 1260-61 (5th Cir. 1977); *Spark v. MBNA Corp.*, 157 F. Supp. 2d 330, 340 (D. Del. 2001), *aff'd mem.*, 2002 WL 31059209 (3d Cir. Sept. 16, 2002); *Enterprise Wallpaper Mfg. Co. v. Bodman*, 85 F.R.D. 325, 327 (S.D.N.Y. 1980); *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391, 403-04 (S.D. Iowa 1968); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968)). Once again, petitioners are mistaken.

As the Second Circuit recognized, the cases on which petitioners rely do not involve "opt in" classes at all. Rather, they involve "opt out" classes in which the absent class members were required to submit a claim form in order to recover *damages*. Thus, like the district court, petitioners

> ignore[] the critical difference between, on the one hand, requiring an individual to take affirmative action to join a class for liability determination purposes and, on the other hand, requiring a class member to take action (such as filling out a claim form) in order to obtain the ultimate relief. The former is an "opt in" provision and the latter is not, since a class member who fails to obtain ultimate relief because he did not fill out a claim form is nonetheless still a class member.

Pet. App. 39-40a; *see also Robinson*, 544 F.2d at 1262 (Wisdom, J., concurring) ("The supplemental notice in this case does not violate the amendment to Rule 23(c)(2) because it does not require members to opt-into the class action in order to be bound by it. ... The supplemental notice, directed only to those

members who had not excluded themselves, merely conditioned the receipt of individualized non-injunctive relief on the submission and proof of the claim for such relief."); *cf.* 7AA Charles Alan Wright, *et al.*, *Federal Practice & Procedure* § 1787, at 525 (3d ed. 2005) ("[O]nce defendant's liability is established, the court may be justified in ... requiring class members to file statements of their claims and barring those not presented at that time.").

The split of authority alleged by petitioners is thus illusory, because the plaintiffs in those cases, unlike petitioners here, were given the option of opting out of the class in the first instance, and were bound by the judgment *regardless* of whether they ultimately filed a claim form to recover damages. Indeed, the very treatise cited by petitioners makes this point: while some courts have "used a claims procedure that, as a practical matter limited the number who shared in the common fund," "[n]one of the certified class actions ... defined the class as requiring the filing of a claim as a precondition to becoming a member of the class." 10 Alba Conte & Herbert Newberg, *Newberg on Class Actions* App. XI, at 253 (4th ed. 2002). Because the cases on which petitioners rely thus do not involve "opt in" classes at all, petitioners manifestly err by asserting that "the Second Circuit decision is contrary to ... well reasoned decisions of other circuit and district courts." Pet. 6 (capitalization modified); *see also* Pet. App. 40a n.7 (noting that petitioners "fall into the same trap" as the district court by "rely[ing] on cases ... where courts required class members to take affirmative action to obtain ultimate relief").

In any event, this case does not present an appropriate vehicle for deciding whether "a court may certify a (b)(3) 'opt-in' class as to liability only under Fed. R. Civ. P. 23." Pet. i. As the Second Circuit explained, "even if circumstances necessitating the certification of such a class could be shown, neither the District Court nor [petitioners] have done so in the case before

us." Pet. App. 42a; *see also id.* at 41a ("[E]ven assuming for the argument that Rule 23 permits courts to certify 'opt in' classes when 'certain circumstances' prove them 'necessary,' the District Court clearly erred in defining such circumstances."). The "opt in" provision at issue here, the Second Circuit explained, "was not ... necessary in any objective sense; rather, it was necessary only because [petitioners] defined it into necessity." Pet. App. 41a; *see also id.* ("[T]he purported necessity of the 'opt in' provision is a function not of the circumstances of this case, but of the particular litigation strategy that plaintiffs chose to pursue."). Accordingly, while the Second Circuit declared that "we cannot envisage any circumstances when Rule 23 would authorize an 'opt in' class in the liability stage of a litigation," Pet. App. 41-42a, the court nonetheless held that petitioners could not justify such a class here *even if* it were authorized. That alternative holding (which petitioners have not even bothered to address) effectively forecloses their efforts to pursue review of the abstract question presented (which, as explained above, is not worthy of this Court's review in any event).

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of *certiorari*.

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No. 04-1294

IN THE
Supreme Court of the United States

ROSE ACRE FARMS, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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TABLE OF AUTHORITIES

Page(s)

Cases

Armstrong v. United States,
364 U.S. 40 (1960) 6

City of Rancho Palos Verdes v. Abrams,
125 S. Ct. 1453 (2005) 2

Connolly v. Pension Ben. Guar. Corp.,
475 U.S. 211 (1986) 6

Dolan v. City of Tigard,
512 U.S. 374 (1994) 9

Dura Pharms., Inc. v. Broudo,
125 S. Ct. 1627 (2005) 3

Gillepsie v. United States Steel Corp.,
379 U.S. 148 (1964) 2

Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal,
No. 04-1084, 2005 WL 349538
(Apr. 18, 2005) 2, 3

Gonzales v. Raich,
No. 03-1454, 124 S. Ct. 2909 (2004) 2

Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470 (1987) 6

Land v. Dollar,
330 U.S. 731 (1947) 2

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 9

Miller v. Schoene,
276 U.S. 272 (1928) 10

Monterey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687 (1999) 9

National Cable & Telecomm. Ass'n v. Brand X Internet Servs.,
No. 04-277, 125 S. Ct. 654 (2004) 2

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 9

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 1

Penn CentralTransp. Co. v. New York City,
438 U.S. 104 (1978) 1, 6, 8, 10

Rose Acre Farms, Inc. v. Madigan,
956 F.2d 670 (7th Cir. 1992) 9

United States v. 50 Acres of Land,
469 U.S. 24 (1984) 3

United States v. General Motors Corp.,
323 U.S. 373 (1945) 2, 3, 4

United States v. Olson,
No. 04-759 (2/17/05) 3

Other Authorities

Stern, Robert L., *et al.*,
Supreme Court Practice § 4.18 (8th ed. 2002) ... 2

The United States does not contest the existence of deep and lingering confusion over the standards by which lower courts assess Fifth Amendment takings claims. Nor does it address "the difficult, persisting question of what is the proper denominator in the takings fraction," *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001)—the very question that has divided lower courts in this case and led to inconsistent judgments in state and federal courts across the country. The law, in short, is in utter disarray, and the United States does take issue with that fundamental fact. Instead, the United States attempts to discourage this Court from authoritatively resolving the important constitutional questions presented here by pointing to alleged vehicle problems and procedural obstacles. The Acting Solicitor General is wrong. There are no such problems or obstacles. To the contrary, this case arises in a sturdy posture and squarely presents questions that cry out for authoritative resolution by this Court.

1. The United States contends that review is unwarranted "because of the interlocutory posture of the case." Opp. 9. Certiorari would be premature, the argument runs, because the Court of Appeals remanded for additional findings in light of its constitutional analysis. There is no merit to this argument. To begin with, it is essential to recognize that respondent is making a prudential—rather than a jurisdictional—point. Indeed, respondent concedes that this case falls squarely within this Court's jurisdiction, and even seeks review of related questions if the petition is granted. *See* Opp. 9 n.1; Conditional Cross Pet. For Certiorari 7-8.[1]

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[1] The Cross Petition identifies no confusion or division in the lower courts on its single question presented. Nor does it address why that issue is of recurring importance or otherwise warrants this Court's review. Instead, the Cross Petition seeks error correction on an issue that was not dispositive of either decision below. For all of these reasons, the Cross Petition should be denied. Granting the Cross Petition, moreover,

And the petition should be granted. The mere fact that the Court of Appeals remanded for further proceedings—in line with a published 35-page opinion—does not militate against review of a constitutional holding that established the legal framework for remand. As this Court has repeatedly recognized, a remand by a court of appeals is of no moment where the petition presents questions that are "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (internal quotation omitted). *See also Gillepsie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964) (same); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (same); *see also* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002).

This rule is amply illustrated here. The Federal Circuit vacated a judgment of the Court of Federal Claims after establishing the constitutional framework to be applied on remand. If the Court of Appeals was wrong—and the Court of Claims was right—then this case is over and there is nothing left to decide. Not surprisingly, a substantial portion of this Court's docket—in this current Term as well as any other Term—consists of cases identical to this one; namely, cases in which a court of appeals establishes a legal framework and then remands for further proceedings. *See, e.g., Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, No. 04-1084, *cert. granted*, 2005 WL 349538 (Apr. 18, 2005); *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005); *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627 (2005); *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, No. 04-277, *cert. granted*, 125 S. Ct. 654 (2004) *Gonzales v. Raich*, No. 03-1454, *cert. granted*, 124

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would create the chance that the Court's resolution of this case would not clearly resolve the primary question here; namely, the "persisting question of what is the proper denominator in the takings fraction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

S. Ct. 2909 (2004).[2]

The United States similarly cannot deny that this Court routinely reviews Fifth Amendment takings challenges after a court of appeals has remanded for further proceedings. As the Court stated in *General Motors Corp.*, in language directly applicable to this case:

> The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. *We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case.* The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: "nor shall private property be taken for public use, without just compensation," *which conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs.*

General Motors Corp., 323 U.S. at 377 (emphasis added). *See also United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (review of eminent domain challenge following remand for new trial). At bottom, there is no basis for denying the petition on the primary ground relied on by the United States. This case has now been litigated for more than twelve years. It squarely presents recurring and important constitutional questions that are extensively

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[2] The United States' suggestion that review is unwarranted in this posture is rather odd, because the United States—probably more than any other litigant—routinely urges this Court to grant certiorari in cases (like this one) where the court of appeals has established the "legal framework" for a remand. *See* Reply Br. for the U.S. at 8, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, No. 04-1084 (3/29/05) (granted on Apr. 18, 2005); *see also* Reply Br. for the U.S. at 10, *United States v. Olson*, No. 04-759 (2/17/05) (granted on Mar. 7, 2005).

analyzed in two published lower court opinions. This Court has granted review of similar questions arising in an identical posture. And state and federal courts are in disarray on the very questions that the petition presents. Prudence, in sum, counsels *in favor* of certiorari rather than allowing further litigation (and further waste of judicial resources) under an erroneous constitutional standard.

2. The United States argues that the fundamental denominator question should not be reviewed because (in its view) the Federal Circuit correctly included in the takings fraction every Rose Acre farm at which some hen houses were restricted. This argument misses the point. The issue cries out for review not simply because the Federal Circuit was wrong, but also because of the deep and widespread confusion over *how* the denominator itself should be determined. The United States does not contest that the state and federal courts are sharply divided over this issue. Nor could it. As the petition explained, *see* Pet. 10-16, and the amici discuss in great detail, *see* Brief of Amici Curiae Defenders of Property Rights *et al.* 5-12, federal and state courts at every level have applied wildly inconsistent standards to calculate the "relevant parcel" in takings cases. The upshot is dramatically different results for similarly situated property owners. Such a situation is untenable in any legal context, but it is especially so here, where the question goes to the heart of the only constitutional protection that "conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs." *General Motors Corp.*, 323 U.S. at 377.

a. The United States tries mightily to defend the Federal Circuit, but its defense only confirms the need for review. According to the United States, the Court of Appeals properly included Rose Acre's three farms as a whole in the denominator (thereby substantially reducing the economic impact) because (1) all of the hen houses on these farms were technically covered by the USDA regulations and (2) the restrictions themselves increased consumer confidence

and thus increased the sales of unrestricted eggs. *See* Opp. 10-12. Putting aside for the moment that these arguments have little bearing on the suitability of the petition for review, they also totally ignore what actually happened in this case.

The United States contends that the "relevant unit of regulatory oversight," *id.* at 11, is all of Rose Acre's three farms because in addition to restricting the sale of certain eggs, the USDA regulations required "'testing for purposes of monitoring'" elsewhere on the farm. *Id.* (quoting Pet. 21a). The "taking" at issue here, however, is not the incidental burden caused by testing elsewhere but the actual prohibition on sales that destroyed the value of nearly 700 million *healthy eggs*. As the United States elsewhere is at pains to explain, this case involves the regulatory taking of personal property—not real property. The question presented, thus, is whether—as the trial court found—the relevant parcel for the takings analysis should be the *700 million restricted eggs* or—as the Federal Circuit found—those restricted eggs *plus* the billions of other healthy eggs that Rose Acre happened to produce on its farms but the sale of which the USDA never restricted.

Under the trial court's approach, the constitutional inquiry focuses on the government conduct and the character of the restrictions. Under the Federal Circuit's approach, however, the inquiry focuses on the wealth of the property owner, and permits the government to self-characterize its own restrictions in a manner that avoids meaningful scrutiny. Indeed, the government does not explain why the fact that the regulations technically applied to "each farm as a whole" should alter the takings inquiry where there is no dispute that the restrictions *in fact* "applied ultimately to individual [egg producing] houses." Opp. 10-11. Nor is there any sound constitutional basis for such a rule. The takings inquiry should turn on what the government *did*—not on what the government said it would or could have done.

The United States also fails to explain (or cite any authority for) its remarkable proposition that the secondary effects of government regulation—including "increased consumer confidence" in the egg market—should factor into the constitutional inquiry and deflate the true economic impact of challenged government conduct. This argument is both meritless and especially misplaced here—a case that involves the confiscation, restriction, and/or destruction of *healthy and economically viable* private property. If such property is destroyed or restricted to bolster "consumer confidence" writ large, then "in all fairness and justice" the costs of those confiscations and restrictions should "be borne by the public as a whole," not by one private farming business. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (internal quotation omitted). In short, the government's position on the merits confirms the dubious nature of the Federal Circuit's legal analysis—an analysis that finds no support in this Court's precedents, common sense, or the history and purpose of the Fifth Amendment.

b. Recognizing the difficulty of defending the Court of Appeals, the United States falls back on two additional arguments for why "the instant case would be an unsuitable vehicle" for review. *See* Opp. 12. But these arguments are even weaker than the interlocutory point addressed above. First, the United States contends that "the 'parcel as a whole rule' is most often applied in cases involving land-use regulation," *id.*, and, thus, a case involving personal (as opposed to real) property presents an unworthy vehicle for addressing the denominator issue. But this Court has consistently applied the same legal standard to takings challenges involving personal as opposed to real property, *see* Pet. 10 n. 3—which is why the Federal Circuit concluded *as a matter of law* that it was obligated under *Penn Central* and *Keystone Bituminous* (both real property cases) to apply the "parcel as a whole" concept to regulations affecting *only* personal property. The United States itself cites those very precedents to defend the Federal Circuit, *see* Opp. 10,

without ever explaining why those cases would be distinguishable from this one, *see* Pet. 14-15. Accordingly, there is no sound reason for avoiding review merely because this case involves personal property.

On the other hand, however, if this Court's real property cases should *not* apply to a takings challenge involving personal property (as Rose Acre argues and the United States later suggests), then clarification from this Court is long overdue. Amici detail the welter of confusion on this point in the state and federal courts. *See* Amicus Br. 14-17 (citing cases and "highlighting the need for this Court to address this [denominator] issue in the personal property context"). And the absurdity of applying the parcel as a whole rule in the personal property context—which is now the rule in the Federal Circuit, the most important venue for takings challenges—is amply demonstrated by the opinions below. Under the Federal Circuit's rule, the $6 million loss suffered by Rose Acre (and deemed compensable by the trial court) is diluted by whatever other assets Rose Acre happens to own. That is because the "parcel as a whole" directs the court's attention to Rose Acre's "assets as a whole," *i.e.*, billions of eggs that have nothing whatsoever to do with its claim. In other words, because Rose Acre is a successful operation, with several farms and millions of egg-producing hens, its economic loss is substantially diluted, and a taking less likely to have occurred, irrespective of the scope and nature of the *government conduct* that should be the focus of the constitutional inquiry. A smaller egg producer with a single farm and fewer hens, by contrast, would be deemed to have suffered a vast compensable loss even when subject to *identical* government restrictions. *See* Pet. 16; Amicus Br. 17-18. Such a regime has no basis in the Constitution or in common sense.

Additionally, the United States claims that this case is "idiosyncratic" because Rose Acre "presumably experienced a profit on its sales" of non-restricted eggs. Opp. 13. The fact that Rose Acre remained a profitable business, however,

has no relevance to the takings question. Once again, the government is trying to shift the focus away from its own conduct—the imposition of severe restrictions on *healthy and economically viable* private property. Furthermore, its argument on this score invites a perverse incentive structure by which claimants are discouraged from mitigating losses in order to state an actionable takings claim. The record in this case, for example, demonstrates that it was Rose Acre's nimble business acumen that secured financial recovery from the vast economic losses attributable to the confiscation and restrictions of its healthy eggs and hens. *See* C.A. App. 896 (discussing actions taken to avoid going out of business). Such good business practices, however, should have nothing to do with whether government conduct amounts to a taking and entitles a claimant to compensation.

3. The government's objections to the second and third questions presented are equally unavailing. *See* Opp. 14-19.

a. There is no defense for the Federal Circuit's application of *Penn Central*'s character prong, which required Rose Acre to prove that the USDA *knew* its restrictions lacked a scientific basis. *See* Pet. 17-19. The trial court rightly found that those restrictions were based on the hypothesis that SE in a hen environment would necessarily translate into SE in hen-laid eggs—a hypothesis later proved to be wrong and unfounded, thus stripping away the only alleged basis for restricting the sale of Rose Acre eggs. *See* Pet. 7-8, 18. The United States does not explain how such a record satisfies *Penn Central*'s character prong. Instead, it suggests that the character prong serves only to "distinguish[] between cases in which the government appropriates or physically invades private property, and those in which it simply limits the uses to which property may be put." Opp. 14. If that is all the character prong requires, then it is for this Court to say so. As the law presently stands, however, the character inquiry requires challenged action to "substantially advance legitimate state interests" before surviving Fifth Amendment scrutiny.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992); *see* Pet. 17-18 (citing cases). The Federal Circuit simply failed to apply that test.

The United States also makes the peculiar argument that there should be no taking because the USDA acted consistent with "established administrative law principles." Opp. 15-16. But the Administrative *Procedure* Act emphasizes the *process* by which an agency makes a decision, not its substantive outcome. The strong presumption of regularity that applies to an agency record, therefore, is irrelevant to the *constitutional* question of what compensation is required after the government destroys the value of private property. As Judge Easterbook explained thirteen years ago—when there *was* an administrative law challenge to the underlying regulations—the APA makes "the Secretary's assessment of the data, not a judge's . . . controlling." *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 675 (7th Cir. 1992). Such principles have no bearing on a subsequent Fifth Amendment challenge in the Court of Federal Claims. *See id.* at 677 ("How far compensation may be necessary is a legal question . . . for another court").

b. The United States claims this case "presents no question" concerning the proper application of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), because the Federal Circuit "placed no meaningful reliance" on that decision. Opp. 16. But the Federal Circuit explicitly cited *Nollan* and then applied its "nexus test" in a manner that effectively shields government conduct from meaningful scrutiny. *See* Pet. 19-21. Indeed, this vital portion of the Federal Circuit's opinion makes no sense unless the court was relying on and extending *Nollan* outside the limited context of land exactions, an extension that—as the United States concedes, *see* Opp. 16—this Court's decisions flatly prohibit. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999); Opp. 16 ("Rose Acre is correct that the *Nollan/Dolan* standard applies only in the 'special context of land exactions'").

c. The United States contends that the categorical seizure and destruction of more than 6,000 *healthy hens* was properly reviewed as a regulatory taking under *Penn Central*. *See* Opp. 17-19. But its analysis misstates the record and draws an inapt analogy to the heavily regulated pharmaceutical industry. On the record, the United States claims a sample of the hens "tested positive [for SE]." Opp. 18 (brackets in Opp.) (citing C.A. App. 949). The brackets, however, add information that is nowhere in the record. Very few of the confiscated hens tested positive for SE, which is one of the chief reasons the trial court ordered compensation for their outright destruction. The record citation (C.A. App. 949) provides only that *some* hens tested positive for *some* forms of salmonella (of which there are 2,000 strains) not the far more serious and regulated strain of SE. There has *never* been a showing that the hens for which the trial court awarded compensation tested SE positive.

Similarly, the analogy to the heavily regulated pharmaceutical industry is totally inapt. Prior to the regulations at issue here, the *only* federal regulation governing egg production dealt with grading standards. *See* Pet. 64a. Both lower courts in fact concluded that Rose Acre enjoyed an investment-backed expectation to sell its healthy eggs as table eggs in interstate commerce and that the USDA regulations were not foreseeable. *See* Pet. 22a-23a, 64a-65a.[3] Thus, the suggestion that review may intrude on regulation of the drug industry lacks merit and should not bear on the certworthiness of the third question presented.

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[3] Equally misplaced is the United States' reliance on cases involving the destruction of *diseased* property—such as infected trees—to "prevent contagion." Opp. 17-18 (citing *Miller v. Schoene*, 276 U.S. 272, 277 (1928) (trees were destroyed to "prevent[] the communication of a rust or plant disease *with which they were infected*") (emphasis added)). The only issue here is the seizure and destruction of *healthy egg-laying hens*. There has never been a showing that these slaughtered hens (in contrast to the cedar trees in *Miller*) were a threat to anything or anyone.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition and in the Brief of Amici Curiae, this Court should grant a writ of *certiorari*.

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